Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JARED L. DILLON,

Petitioner,

v.

MOUNTAIN COAL COMPANY, L.L.C.;
ARCH WESTERN RESOURCES, L.L.C.,
a Delaware Corporation; ARCH COAL, INC.,
a Delaware Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1) May evidence of pretext be used to prove an employee is regarded as disabled under the Americans with Disabilities Act, and if so, do falsehoods regarding policies applicable to impaired individuals and about the ability to accommodate impaired individuals constitute such pretext evidence?

2) Under the Americans with Disabilities Act, when the major life activity under consideration is "working," must the employee always present evidence of the geographic area to raise a question of fact with respect to being disabled, including in a regarded as disabled case?

3) Is evidence that the employer believes the employee is unable to perform any job in a facility with multiple jobs sufficient to raise a question of fact that the employer regards the employee as disabled under the Americans with Disabilities Act?

4) Under the Americans with Disabilities Act, is a "no restrictions" policy evidence that an employer regards a restricted employee as disabled?

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Clawson v. Mountain Coal Co., L.L.C., 2007 U.S. Dist. LEXIS 5017; 18 Am. Disabilities Cas. (BNA) 1874 (D. Colo. January 24, 2007).

Dillon v. Mountain Coal Co., L.L.C., 569 F.3d 1215; 21 Am. Disabilities Cas. (BNA) 1831; 13 Accom. Disabilities Dec. (CCH) P.13-245 (10th Cir. 2009).

STATEMENT OF THE BASIS FOR JURISDICTION

Judgment was entered June 23, 2009.

The Petition for Rehearing was denied July 28, 2009.

This court has jurisdiction pursuant to 28 U.S.C. §1254.

STATUTES INVOLVED

Relevant Statutes are set forth in Appendix D to this Petition.

STATEMENT OF THE CASE

I. Introduction And Procedural Background

Jared Dillon was a coal miner. Aplt.App. p.3562. After sustaining an injury and undergoing a period of recovery, Dillon was given permanent lifting restrictions of twenty-five pounds occasionally, fifty pounds

maximum. Aplt.App. p.3420, 3425-3427. When Dillon attempted to return to work for his employer, Mountain Coal Company, L.L.C., it refused to engage in the interactive process with him to determine if he could work for the company. Aplt.App. p.4087. In fact, every job in the mine could be performed with a fifty pound lifting restriction. One job conformed precisely to Dillon's restrictions, and two could be done with a fifteen pound lifting restriction. Aplt.App. Aplt.App., p.2290-2294; p.2353; p.2885-2886; p.3145-3146; 3367-3368; p.3421; 3571-3572; p.3577-3578. Instead of engaging in the interactive process with Dillon, MCC fired him pursuant to its 100% healed policy, which provided that "no hourly employee will be allowed to return to work in any capacity" unless "he/she may return to duty with 'no restrictions.'" Aplt.App. p.2304; *see also* Aplt.App. p.2303, 2306, 2308, 2401.

Dillon brought an Americans with Disabilities Act suit against MCC, and its two parent companies, Arch Western Resources, L.L.C. and Arch Coal Company, Inc. Aplt.App. p.231-282, 283-287. The United States District Court for the District of Colorado had jurisdiction pursuant to 28 U.S.C. §1331. After discovery and various pre-trial proceedings, Dillon and a co-plaintiff proceeded to trial on ADA discrimination claims and a claim that MCC, Arch Western, and Arch Coal constituted an integrated enterprise.[1] Aplt.App. p.986-993. Dillon alleged that he was regarded as disabled by MCC. Aplt.App. p.986-993. The jury returned a verdict in favor of both plaintiffs on all claims. Aplt.App. p.986-993.

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1. For ease of reference, Dillon will refer to the defendants collectively as MCC.

After the trial, the district court granted MCC's Fed. R. Civ. P. 50(b) motion in regard to Dillon, but denied it in regard to his co-plaintiff. Aplt.App. p.1315. The court ruled there was no evidence Dillon was regarded as disabled. Dillon appealed the judgment. The Tenth Circuit affirmed the district court in a published opinion. Dillon filed a petition for rehearing, which was denied.

II. Summary Of The Evidence Taken In The Light Most Favorable To Dillon

Dillon's suit arose out of an injury he sustained at work. Aplt.App. p.3572-3573. Dillon was a "lube man" for MCC, a position also known as a "greaser" or "servicer". Aplt.App. p.3566, 3552. Subsequent to his injury, Dillon was given a temporary lifting restriction of fifteen pounds. Aplt.App. p.3426-3427. An internal MCC memo establishes that he could perform his job of lube man, or servicer, with this restriction. Aplt.App. p.2353. However, after experiencing some difficulties, he was assigned to the job of fuel hauler. Aplt.App. p.3577-3578. Fuel hauler, like lube man, was a regular job at the mine. Aplt.App. p.2885-2886, 3367-3368. Dillon later attempted to return to his lube man position, but eventually followed his supervisor's advice and went home until he was "fixed." Aplt.App. p.3587-3588.

After a period of months, Dillon was released to work with permanent lifting restrictions of twenty-five pounds occasionally, fifty pounds maximum. Dillon called the Human Resources Director, Langrend, and requested to return to work. Aplt.App. p.4282. Langrend told Dillon he could not return to work unless he had no restrictions, and when Dillon confirmed he

could not provide a full release, Langrend refused to return him to work. Aplt.App. p.4282. When Dillon stated he had been allowed to work with restrictions previously, he was told, "that was then this is now." Aplt.App. p.4283. Consistent with this conversation, Dillon presented substantial evidence that MCC had a 100% healed policy, including both documentation and testimony. Both the district court and the Tenth Circuit concluded the evidence supported the existence of such a policy.

At trial, Dillon also presented evidence that there were numerous positions at MCC, including such jobs as lube man, fuel hauler, materials handler, roof bolter, belt mechanic, longwall mechanic, fire boss, ram car driver, and warehouse technician. Aplt.App. p.2865; p.2872; p.2881-2882; p.2944-2945; p.2952; p.3353. As noted above, lube man and fuel hauler could be performed with a fifteen pound lifting restriction. The warehouse technician position conformed to Dillon's restrictions. Aplt.App. p.2291-2292. The employees and former employees of MCC testified that each person only had to perform his or her job. As one witness stated, "You're not required to learn anything above and beyond what your normal job is." Aplt.App. p.3322.

Dillon could perform at least three jobs at the mine, and probably all of them given his fifty pound lifting restriction. Despite this, Langrend held the opinion that Dillon could perform no job at the mine, and was not even close to meeting the requirements of working there. Aplt.App. p.4071-4072, 4087-4089.

At trial, despite the documentary evidence, MCC denied that it had a full release policy. Aplt.App. p.2999-3000, 3038. However, the mine president also admitted that the Colorado Civil Rights Division had been told by MCC's counsel that MCC did have a full release policy. Aplt.App. p.3007-3011, 3811-3812. Langrend also denied having the conversation with Dillon where he stated Dillon must have a full release to return to work. Aplt.App. p.4084-4085. Additionally, MCC's written policy was that an employee was automatically fired if his short term disability insurance expired, and he was still unable to return to work, which would include having restrictions. Aplt.App. p.2417-2421. Dillon received a letter stating he was being fired pursuant to this policy. Aplt.App. p.2354. However, MCC also denied having this policy. Aplt.App. p.2660-2661. Furthermore, despite the testimony of numerous current and former miners, MCC claimed it had only two positions in the mine: miner and mechanic. Aplt.App. p.4056-4057. MCC argued that Dillon must be able to perform any job at the mine as justification for its refusal to accommodate him or return him to his former position. It is clear from the jury's verdict that it did not believe MCC's evidence.

Although Dillon did not have an expert, he did present some evidence regarding the geographic area. Dillon had access to the geographic area around Hotchkiss, Colorado, including the towns of Delta, Somerset, and Gunnison. Aplt.App. p.3654-3656. In addition to West Elk, owned by MCC, there were two other coalmines in the area, Bowie and Oxbow. Aplt.App. p.3341, 3655. Dillon had less than a full high school education, leaving in the tenth grade. Aplt.App. p.3559. Dillon's work history was in ranching, farming,

maintenance, and mechanical work. Aplt.App. p.3560. Thus, Dillon only had access to blue-collar jobs in the Hotchkiss geographic area.

Dillon testified that steady work outside of mining was difficult to obtain. Aplt.App. p.3564. Dillon's co-plaintiff, Mike Clawson, had a high school diploma, and like Dillon had a history of working blue-collar jobs. Aplt.App. p.3338-3339. Clawson testified the work he was able to find consisted of mining, driving, or heavy equipment operation. Aplt.App. p.3391-3393. Mining work was at a substantially higher pay scale than other blue-collar work available to those with a high school education or less. Aplt.App. p.3514, 3562, 3592-3594, 3678, 2432, 2433.

III. The Tenth Circuit Opinion

The Tenth Circuit agreed that Dillon had presented evidence sufficient to demonstrate the existence of the 100% healed policy, and that he was terminated from employment pursuant to it. The Tenth Circuit also agreed this showed a belief as to Dillon's inability to perform any job at MCC. However, the Tenth Circuit held that this did not raise a question of fact as to whether MCC regarded Dillon as unable to work in a broad range or class of jobs. The Tenth Circuit held that Dillon's evidence regarding the geographic area was insufficient, because it did not show the number and types of jobs available. The court held that such evidence is required to prove a plaintiff is disabled, or regarded as disabled, in the major life activity of working. The court indicated skepticism that evidence of pretext could prove a plaintiff is regarded as disabled, which is

consistent with Tenth Circuit precedent that pretext evidence cannot establish a plaintiff is regarded as disabled. *Rakity v. Dillon Cos.*, 302 F.3d 1152, 1164-66 (10th Cir. 2002). Further, the court held that, despite the falsehoods and contradictions of MCC, Dillon presented no pretext evidence. For these reasons, the Tenth Circuit affirmed the district court in overturning the jury's verdict and granting judgment as a matter of law to MCC.

REASONS FOR GRANTING THE PETITION

I. Elements Of An ADA Claim

The ADA prohibits discrimination against qualified individuals with disabilities. *Sutton v. United Air Lines*, 527 U.S. 471, 477 (1999). To establish a prima facie case of discrimination, the plaintiff must prove the following three elements: 1) the plaintiff is "disabled" as defined in the ADA; 2) the plaintiff is qualified, with or without an accommodation, to perform the essential functions of a job he holds or desires; and 3) the defendant discriminated against the plaintiff because of the disability. *MacKenzie v. Denver*, 414 F.3d 1266, 1274 (10th Cir. 2005).

Under the ADA, "disability" is defined as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;" "(B) a record of such an impairment; "or "(C) being regarded as having such an impairment." *Sutton*, 527 U.S. at 478, *quoting* 42 U.S.C. §12102(2).

> There are two apparent ways in which individuals may fall within this . . . definition

> [of regarded as disabled]: (1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual nonlimiting impairment substantially limits one or more major life activities.

Sutton, 527 U.S. at 489.

To be disabled in the major life activity of working, the employee must be limited from a class or broad range of jobs, rather than from just one job. *Id.* at 491-92 *citing* 29 C.F.R. §1630.2. A class of jobs includes the number and types of jobs utilizing similar training, knowledge, skills, or abilities, within the employee's geographic area. 29 C.F.R. § 1630.2(j)(3)(ii)(B). A broad range of jobs includes the number and types of jobs not utilizing similar training, knowledge, skills or abilities within that geographic area. 29 C.F.R. §1630.2(j)(3)(ii)(C). "The terms 'number and types of jobs' and 'number and types of other jobs' ... are not intended to require an onerous evidentiary showing." 29 C.F.R. pt.1630 appx. "Heavy labor job[s]" and "semi-skilled jobs" are classes of jobs, and an individual need only be excluded from one class of jobs to be found disabled. 29 C.F.R. pt.1630 appx.

II. This Court Should Resolve The Split In The Circuits And Hold That Pretext Evidence Is Also Evidence An Employee Is Regarded As Disabled

A. There is a Split of Authority Regarding Whether Pretext Evidence is Also Evidence An Employee is Regarded As Disabled

There is a dispute among the circuits, and the legal community, on the proper use of pretext evidence to demonstrate a plaintiff is regarded as disabled. *See* Jennifer Schechter Sharret, Note: *Refining the Production Burden for "Regarded As Disabled" Claimants*, 28 Cardozo L. Rev. 991 (November 2006) (Highlighting the split between the Tenth and Seventh Circuits with the Sixth Circuit, and suggesting a resolution). This Court's prior decisions in *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133 (2000) and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) suggest that the proper resolution of this split is to once again hold that circumstantial evidence may be used to prove a discrimination case, and that pretext is simply another form of circumstantial evidence.

The Ninth Circuit held that evidence of pretext presented at trial can also be used to prove that the employee was regarded as disabled by the employer. *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1228-1229 (9th Cir. 2001). Based on the evidence presented at trial, the jury could have concluded the reasons the employer gave for refusing to re-hire the plaintiff were pretextual. *Id.* at 1228. The court further held that this same evidence also supported the finding that the employer regarded the plaintiff as disabled. The

court relied upon *Reeves'* explanation that falsity in testimony may be considered as affirmative evidence of guilt. *Id.* at 1228-1229. The court stated, "finding pretextual an explanation for an adverse employment action can affirmatively support the conclusion that the employer was dissembling to cover up the fact that it regarded the employee as disabled." *Id.* at 1229.

Also relying upon *Reeves*, the Sixth Circuit reached the same conclusion as the Ninth. *Ross v. Campbell Soup Co.* 237 F.3d 701, 708-709 (6th Cir. 2001). The employer had argued that plaintiff was not qualified for his job, despite favorable employee reviews. *Id.* at 708. The court held that the pretextual justification given by the employer for terminating plaintiff also served as evidence that the employee was regarded as disabled. *Id.* The court explained that like "intent," the fact an employee is regarded as disabled turns upon the employer's state of mind. *Id.* Therefore, evidence that might normally prove the state of mind of intent, such as pretext evidence, can also prove the employer regarded the employee as disabled. *Id.* While the jury need not accept inference the false explanations were given to cover up a belief the employee is disabled, it is an inference the jury could make. *Id.* at 708-709.

The Sixth Circuit reconfirmed its opinion in *Moorer v. Baptist Mem'l Ctr. Health Care*, 398 F.3d 469, 481 (6th Cir. 2004). In *Moorer*, the employer based its explanation for terminating plaintiff upon written reports. *Id.* at 481-483. However, none of the written reports existed prior to the plaintiff's termination. *Id.* Although some of the reasons existed prior to the termination, the falsehoods regarding the reports and

some reasons allowed for a finding of pretext. *Id.* Citing *Ross*, the court stated that this evidence tended to prove the employer regarded plaintiff as disabled. *Id.* at 483. The court did state in *Moorer* that more than pretext was required. *Id.* However, it held that pretext coupled with the inference that the plaintiff's inability to perform his current job meant he could perform no management job, was sufficient to raise a question of fact as to whether plaintiff was regarded as disabled. *Id.* at 483-484. This is consistent with the determination in *Ross* that pretext, plus the role the plaintiff's impairment played in the decision to fire him, allowed an inference he was regarded as disabled. *Id.* at 481; *Ross*, 237 F.3d at 709.

The Tenth Circuit considered, and rejected, the conclusion of the Sixth Circuit in *Ross*. *Rakity v. Dillon Cos.*, 302 F.3d 1152, 1164-1166 (10th Cir. 2002). The Tenth Circuit reasoned that the *McDonnell Douglas* framework was established to prove the existence of discrimination. *Id.* at 1165. Because the employer in *Rakity* admitted it acted based on the plaintiff's impairment, but denied he was disabled, the Tenth Circuit determined that the *McDonnell Douglas* test never came into play. *Id.* For this reason, the court held that pretext evidence had no bearing upon the case. *Id.* The court compartmentalized pretext evidence as only applying to the third part of the *McDonnell Douglas* framework, because to do otherwise would potentially open up the class of people meeting the prima facie case who would not otherwise be able to meet the test. *Id.* Thus, the court limited the evidentiary consideration that might be given to pretext evidence.

The Seventh Circuit cited the Tenth as having "soundly rejected" *Ross* and followed suit in holding pretext evidence is not evidence the plaintiff is regarded as disabled. *Nese v. Julian Nordic Const. Co.*, 405 F.3d 638, 641-642 (7th Cir. 2005). *Nese* likewise relied upon the *McDonnell Douglas* framework in rejecting the use of pretext evidence to prove a plaintiff is regarded as disabled. *Id.* at 641. Like *Rakity*, the Seventh Circuit compartmentalized the evidence, and showed reluctance to allow evidence of pretext to be used to meet the prima facie case required by *McDonnell Douglas*. *Id.* The court stated that not every case of pretext necessarily involves discrimination and determined not to allow the fact finder to make this determination. *Id.* at 642.

B. This Court Ought to Allow Pretext Evidence to Be Used As Evidence a Plaintiff is Regarded As Disabled

There is a clear split of authority among the circuits on the question of whether pretext can be used to show a plaintiff is regarded as disabled. This clearly bears upon Dillon's claims. The Tenth Circuit noted that Dillon relied upon Sixth Circuit authority to argue pretext. Tenth Circuit Opinion at p.12. As demonstrated above, Tenth Circuit authority is to the contrary. Like *Rakity*, the Tenth Circuit in this case fell into the trap of compartmentalizing pretext evidence into the *McDonnell Douglas* framework, thus deciding there was no evidence of pretext. However, as shown below, the determination there was no evidence of pretext is in conflict with this Court's holdings as well as the holding of other circuits, in part, because it miscomprehends the nature and use of pretext evidence.

This issue remains relevant under the ADAAA. Under the ADAAA, the plaintiff must still prove the adverse action was taken due to an "actual or *perceived* . . . impairment." 42 U.S.C. §12102(3) (emphasis added). Thus, a future plaintiff will still have to prove the motivation for the employer's actions as well as the employer's perception of the employee.

The approach of the Sixth and Ninth Circuits is most consistent with *Reeves* and *Hicks*, and is the approach that should be affirmed by this Court. *Reeves* confirmed that discrimination should be treated like any other question of fact. 530 U.S. at 147. *Reeves* held that an employer's false explanation for its actions is itself circumstantial evidence of intentional discrimination that "may be quite persuasive." *Id.* at 147. "Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt.'" *Id. citing* 2 J. Wigmore, Evidence § 278(2), p. 133 (J. Chadbourn rev. ed. 1979). Use of a defendant's falsehoods is not limited to proving pretext, but may be used as affirmative evidence of liability. Thus, the *McDonnell Douglas* framework does not limit the use of pretext evidence.

The Tenth and Seventh Circuits fall into the trap of compartmentalizing relevant evidence based upon the *McDonnell Douglas* framework. The tendency of courts to use this framework to compartmentalize evidence, especially pretext evidence, has been noted by jurists. Honorable Timothy M. Tynkovich, *The Problem With Pretext*, 85 Denv. U.L. Rev. 503, 519 (2008) ("The tripartite scheme leads . . . to . . . over-compartmentalize[d]

evidence."); *Wells v. Colorado Dept. of Transp.*, 325 F.3d 1205, 1224 (10th Cir. 2003) (Hartz Concur) ("the *McDonnell Douglas* formalism indicates that evidence can, and should, be compartmentalized when evaluating its sufficiency."). Both circuits ignored the dictates of *Reeves*, that pretext evidence can be used as affirmative evidence of liability, and limited pretext evidence to its use in the *McDonnell Douglas* framework. As both the Sixth and Ninth Circuits explained, "regarded as disabled" is a state of mind, and an employer's falsehoods about the case demonstrate his state of mind. Both the Tenth and Seventh Circuit erred by compartmentalizing employer falsehoods as being only relevant in the pretext stage of the *McDonnell Douglas* framework. In *Rakity*, the Tenth Circuit made an additional error by holding that falsehoods did not even constitute evidence of pretext, or liability, in the absence of the *McDonnell Douglas* framework, an error it repeated in this case.

C. The Tenth Circuit's Holding That There Was No Evidence of Pretext Is Contrary to the Decisions of This Court and Other Circuits

Although Dillon presented evidence that MCC lied about Dillon's request for accommodation, its ability to accommodate him, his ability to work at the mine, and its policies toward impaired individuals, the Tenth Circuit held that there was no evidence of pretext in this case. This holding is contrary to other circuits and the dictates of this Court.

The Seventh Circuit has held that pretext "is a deliberate falsehood." *Forrester v. Rauland-Borg Corp.*,

453 F.3d 416, 419 (7th Cir. 2006). This is so even if the statement has some basis in fact, but is ultimately not true. *Id.* The Eight Circuit has held that "[a]n employee can prove pretext in several ways." *Hite v. Vermeer Mfg. Co.*, 446 F.3d 858, 867 (8th Cir. 2006). This can include employer falsehoods. *Id.* This can include a direct contradiction between the employer and the employee, because the fact finder may believe the employee. *Id.* at 867-868. The Third Circuit also indicated that an employer's lies are a sufficient indication of pretext. *Moorer*, 398 F.3d at 481-483. Finally, this court indicated in *Reeves* that employer falsehoods were evidence of pretext. 530 U.S. at 147-148. The Tenth Circuit's opinion contradicts all of these cases.

Although MCC admitted that Dillon's impairment played a role in his termination, it lied about the role it played, and thus the reasons for its actions. MCC denied Dillon asked for accommodation or for his job back, which contradicts Dillon's testimony. It also denied it had a full release policy, or a policy of automatic termination at the expiration of short term disability insurance payments, which contradicts its written policies. MCC claimed it determined Dillon could do no job at the mine. MCC made this claim on the basis that it only had two jobs. Yet the employees testified there were many jobs at MCC, and there were jobs Dillon could perform, and he could probably perform all of them. Although MCC admitted Dillon's impairment played a role in his termination, its falsehoods about the role his impairment played are a form of pretext.

On a more fundamental level, the Tenth Circuit is misapplying the *McDonnell Douglas* framework, as it

did in *Rakity*, by limiting the application of pretext. Essentially, the Tenth Circuit held that because MCC admitted it considered Dillon's impairment, the only question was whether he was in the protected class, but it then compartmentalized the evidence and refused to consider whether pretext helped show Dillon was in the protected class.

The *McDonnell Douglas* framework was never meant to be applied formulaically in a manner limiting or compartmentalizing the consideration of evidence, especially at the trial stage. *See United States Postal Servs. Bd. of Govs. v. Aikens*, 460 U.S. 711, 715 (1983) *and The Problem With Pretext*, supra. However, this is precisely what the Tenth Circuit is doing; it is limiting evidence of an employer's lies to the issue of pretext and refusing to consider whether it proves the ultimate fact of discrimination. This not only puts the Tenth Circuit at odds with the Sixth and Ninth Circuits, but also puts it in conflict with this court. This Court clearly stated in *Reeves* that an employer's falsehoods may not only be considered evidence of pretext, but also as affirmative evidence of liability. The Tenth Circuit has disregarded this dictate, and is in conflict with this Court's holding.

D. This Court Should Resolve the Circuit Split

Although the Tenth Circuit held that there was no evidence of pretext, its holding represents a divergence from this court's holding in *Reeves* and from the approach to the use of pretext in the Sixth and Ninth Circuits. Additionally, there is a clear split between the Sixth and Ninth Circuits on one hand, and the Tenth

and Seventh Circuits on the other, regarding whether pretext is evidence a plaintiff is regarded as disabled. This split will continue to exist under the ADAAA for two reasons. First, "perception" is still a basis for proving a plaintiff is regarded as disabled. Second, there is still confusion and dispute regarding proper use of pretext evidence in light of the *McDonnell Douglas* framework. The Court should take this opportunity to rectify the situation.

III. This Court Should Resolve The Circuit Split And Clarify That Evidence Of The Geographic Area Is Not Always Required When The Major Life Activity Is Working

A. Lower Courts Are Split On the Necessity of Such Evidence

1. A circuit split divides the courts of appeals

This Court has stated that when the major life activity is working, the fact finder "should" consider the geographical area to which the individual has reasonable access, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within the geographical area, from which the individual is also disqualified. *Sutton v. United Airlines*, 527 U.S. 471, 491 (1999). The EEOC regulations describe these as factors that "may" be considered. 29 C.F.R. § 1630.2. The various circuits have taken conflicting approaches in interpreting *Sutton* and the regulations.

The Eleventh Circuit noted that linguistics necessarily implied that geographic evidence was not a requirement.

> [B]ecause we have been instructed that we 'may' and 'should' (not 'shall' or 'must') consider the existence of jobs in the relevant geographical area . . . a plaintiff could testify from his or her own extensive job search whether other jobs that he or she could perform were available in the geographical area.

Mullins v. Crowell, 228 F.3d 1305, fn. 18. (11th Cir. 2000). Accordingly, the court rejected defendant's argument that plaintiff was required to produce geographical evidence. *Id.*

Similarly, the Ninth Circuit concluded that a plaintiff had shown he was restricted from a class of jobs strictly with evidence of his own capabilities and restrictions, without imposing a geographical requirement. *Wellington v. Lyon County School District*, 187 F.3d 1150, 1155 (9th Cir. 1999). There, plaintiff was a high-school graduate with some trade school certification employed in maintenance. *Id.* Carpal tunnel syndrome left plaintiff "permanently limited to 'lighter type activities.'" *Id.* at 1151. Rather than train plaintiff for a new job within his restrictions, the district discharged him. *Id.* at 1153. Plaintiff produced no evidence of the geographical area, but testified as to his own education and abilities, and that he had to quit a light plumbing job that was too strenuous as evidence that he was disabled. *Id.* at 1155. The court held that evidence was

sufficient to show a question of fact as to whether plaintiff was significantly restricted in the ability to work in a class of jobs. *Id.* The court went so far as to imply that the burden is on defendant to show that there *are* jobs in the geographical area. "No expert or other evidence has been presented to suggest that there are jobs available in the labor market for which a person having 'comparable training, skills and abilities' to Wellington would be qualified." *Id.*

In stark contrast, the D.C. Circuit rejected evidence nearly identical to that accepted by the Ninth in *Wellington*, and imposed a strict geographical requirement. *Duncan v. WMATA*, 240 F.3d 1110 (D.C. Cir. 2001). The plaintiff in *Duncan* worked for seven years for defendant, working three jobs, all involving manual labor and heavy lifting. *Id.* at 1113. A series of back injuries rendered plaintiff unable to continue heavy lifting jobs. *Id.* Defendant informed plaintiff they had no light lifting jobs available and eventually terminated him. *Id.*

Though the court quoted *Sutton* as listing factors the court *should* look at, it seemingly interpreted geographical evidence as a requirement for plaintiff to prove he was disabled. Plaintiff presented evidence regarding his back condition and permanent lifting restrictions, age, limited skills, education and experience, and inability to find comparable employment after his discharge. *Duncan*, 240 F.3d at 1115. The court found this evidence insufficient to prove that plaintiff was disabled. "It tells us nothing about whether he was qualified for the many other jobs in the Washington metropolitan employment pool." *Id.* In ruling for

defendant, the court announced a strict evidentiary burden.

> [W]e hold that ADA requires a plaintiff in Duncan's position to produce some evidence of the number and types of jobs in the local employment market in order to show he is disqualified from a substantial class or broad range of such jobs; that is, the total number of such jobs that remain available to the plaintiff in such a class or range in the relevant market must be sufficiently low that he is effectively precluded from working in the class or range.

Id.

In addition to conflicting with several other circuits, the D.C. Circuit's holding was not even condoned by all of its members. One judge concurred with the verdict, but wrote separately to state, "I think it is important to emphasize that although *Sutton* requires Duncan to have proven an inability to perform manual labor, it does not also require him to have shown an inability to qualify for non-manual labor jobs in the area in which he lives." *Duncan*, 240 F.3d at 1121. Chief Judge Edwards went further with a blistering dissent. He stated that the jury had sufficient evidence to find for plaintiff, based on his education, training, work history, and efforts to find another job. *Id.* at 1125. He criticized his brethren for taking the case from the jury. "In nullifying the jury verdict, the majority has impermissibly encroached on the jury's important fact-finding function, which is something that neither a trial judge . . . nor an appellate panel . . . is permitted to do." *Id.* at 1122.

Despite the criticism of *Duncan* and the many cases to rule to the contrary, the Tenth Circuit has sided with the D.C. circuit. The court imposed a rigid geographical requirement on Dillon in the instant case, and because of that burden took the case from the jury. "Mr. Dillon must also show that Mountain Coal regarded him as substantially limited in his ability to perform either a class of jobs or a broad range of jobs in various classes, in the geographic area surrounding West Elk Mine." Tenth Circuit Opinion, p.9. Not only did the court *require* geographic evidence, but it held that evidence to a strict standard. Dillon presented evidence of jobs at a similar coal mine near West Elk. Dillon's evidence was more extensive than that presented in *Mullins* and *Wellington*. Yet, the court found this was insufficient and demanded more evidence regarding the specific jobs at the other mine before the jury could conclude that the jobs utilized the same training, skills and experience. Opinion, p.12.

2. State courts are in conflict with certain circuits

Though ADA claims are litigated less frequently in state court, state supreme courts are also ruling upon the requirement of geographic evidence, perpetuating the need for a single standard. The Iowa Supreme Court cited geographical evidence as a factor which *may* be considered in determining whether an individual is substantially limited in working. *Bearshield v. Morrell*, 570 N.W.2d 915, 919 (Iowa 1997). The court declined to consider plaintiff's geographical region, and instead focused on the types of evidence accepted by the court in *Wellington*, supra. "The record is uncontradicted that

Bearshield has limited education, job training, and experience . . . Most importantly, a reasonable fact-finder could find Bearshield is precluded from doing production line work unless her employer is willing to provide an accommodation . . ." *Id.* at 915. The court found that based on that evidence, plaintiff had demonstrated a material issue of disputed fact. *Id.* This holding is in obvious conflict with the Tenth and D.C. Circuits.

B. Geographic Evidence Should Not Always Be Required

This Court should resolve the split among lower courts and rule that geographical evidence is a permissible factor for consideration, not an evidentiary requirement, when the major life activity is working. As shown in cases like *Mullins* and *Wellington*, some limitations will transcend any geographic boundaries. This includes activities like the ability to do manual labor, or heavy labor jobs.

Geographical evidence is less helpful in a regarded-as-disabled case, because the crux of the issue is the employer's belief about the plaintiff's abilities. "It is a question embedded almost entirely in the employer's subjective state of mind." *Ross v. Campbell Soup Co.*, 237 F.3d 701, 709 (6th Cir. 2000). Subjective beliefs transcend geographical boundaries, particularly in a case such as Dillon's where the evidence shows the employer believed the employee was unable to work in a clear class of jobs. In such a case, the employee's experience, education and physical restrictions suffice to show that the employer regarded the employee as

disabled for an entire class of jobs, as was held in *Mullins* and *Wellington*, supra. The language of *Sutton* clarifies that geographical evidence is acceptable, but not required; this is especially true in regarded-as-disabled cases.

C. This Court Must Resolve the Discrepancy Among the Lower Courts

This Court needs to clarify what is required to prove a substantial limitation in the major life activity of working. In the ADAAA, Congress left no doubt that working is a major life activity. However, Congress chose not to change the definition of working. The courts of appeals, as well as the state courts, require guidance on a plaintiff's evidentiary requirements. Even if this Court limits its holding to regarded-as-disabled cases, and does not address actual disability or record of disability cases, the precedent will be useful to the many cases remaining in the system from events occurring prior to the ADA amendments. This Court should take the opportunity to clarify its holding in *Sutton* as to the evidence needed to prove a substantial limitation in working.

IV. This Court Should Resolve The Circuit Split And Determine That An Employer's Belief That An Employee Can Perform No Job In A Facility Offering Numerous Jobs Is Evidence The Employee Is Regarded As Disabled

A. A circuit split divides the courts of appeals

1. Several circuits have held that a perceived inability to do any job at a multi-job facility is adequate to show regarded-as-disabled

To prove that he is regarded as disabled in the major life activity of working, a plaintiff must show that his employer regarded him as unable to work in a broad class or range of jobs. *Sutton v. United Airlines*, 527 U.S. 471, 492 (1999). Several circuits have held that a plaintiff may accomplish this showing with evidence that his employer did not believe he could perform any job within the employer's facility.

The Third Circuit announced such a rule in *Buskirk v. Apollo Metals*, 307 F.3d 160 (3rd Cir. 2002). There, the plaintiff, an employee who had worked in multiple positions in one facility, fell on the job and injured his back. Defendant terminated plaintiff with a letter stating that because he could not perform his job, and no position was available to meet his limited physical capabilities, his employment was discontinued. *Id.* at 160. The court held that Defendant regarded plaintiff as disabled. "Because the evidence shows that Apollo Metals perceived Buskirk to be unable to perform any of its positions based on his medical condition, Buskirk presented sufficient evidence to satisfy the first prong of a discrimination case under the ADA . . ." *Id.* at 168.

The Fifth Circuit held in accordance with the Third in *EEOC v. E.I. DuPont de Nemours*, 480 F.3d 724 (5th Cir. 2007). In that case, plaintiff's injuries rendered her unable to walk anywhere within the defendant's chemical plant. Plaintiff was subsequently discharged. *Id.* at 728. The court found that plaintiff had demonstrated that her employer regarded her as disabled. "The evidence demonstrates that DuPont did not regard Barrios as restricted from a narrow range of jobs; rather, DuPont regarded Barrios as restricted from *all* jobs at the plant, because every employment position requires walking on the plant site." *Id.* at 729.

Additionally, the Eleventh Circuit held that one can be regarded as disabled if unable to work any job within a facility. *D'Angelo v. ConAgra Foods*, 422 F.3d 1220 (11th Cir. 2005), involved an employee of a seafood packing plant who suffered from vertigo. Plaintiff had worked several positions at the plant, and requested a transfer to a job without a conveyor belt, because it made her dizzy. *Id.* at 1223. The employer informed plaintiff she was terminated due to her physical restrictions. *Id.* The court upheld the district court's finding that plaintiff had presented a genuine issue of material fact as to being regarded as disabled. *Id.* at 1229. The court found that plaintiff

> . . . was regarded as unable to perform any job that would place her in the vicinity of any moving equipment, and thus her employer could not find a single job in the Singleton plant she could perform. Such a far-reaching impairment—which would disqualify her from the entire class of factory jobs--would substantially limit D'Angelo's ability to work.

Id.

2. Several circuits have held that the inability to do a single job is adequate to show regarded-as-disabled if it sufficiently reflects on the inability to perform other jobs

Other circuits examine plaintiff's specific position, and hold a perceived inability to do that job may show the plaintiff is regarded as disabled. The Sixth Circuit held the perceived inability to perform a job in management showed that the plaintiff was regarded as disabled. *Moorer v. Baptist Memorial Health Care*, 398 F.3d 469, 484 (6th Cir. 2005). There, plaintiff was a hospital administrator who was discharged because his employer perceived him to be an alcoholic. *Id.* at 484. Plaintiff's duties were diverse and necessary for most high-level management positions, regardless of the field. *Id.* The court found that defendant regarded plaintiff as unable to work in a broad class of jobs. "The fact that Baptist believed that Moorer's alcoholism made him unable to perform his hospital administrator job, which required a broad range of managerial skills, permits the reasonable inference that Baptist believed that Moorer's alcoholism rendered him incapable of performing a substantial number of managerial jobs." *Id.*

The Fifth Circuit had a similar holding in *Rodriguez v. ConAgra*, 436 F.3d 468 (5th Cir. 2006). Plaintiff was a diabetic, and although he had experienced no adverse affects from the disease, defendant refused to hire him for its plant's entry-level labor position. *Id.* at 472. In ruling that defendant regarded plaintiff as disabled, the court found it very telling that ". . . it viewed him as

unfit for the entry-level Production Utility position—which is a job that . . . virtually any able-bodied person could perform—it follows inescapably that ConAgra viewed Rodriguez as unfit to perform a wide range of jobs." *Id.* at 477. The Fifth Circuit found that summary judgment should be granted in *plaintiff's* favor based on this evidence. *Id.* at 477.

The First Circuit has also ruled that the perceived inability to perform one job can imply the perceived inability to perform many. *Cook v. Dept. of Mental Health*, 10 F.3d 17 (1st Cir. 1993). There, an employer deemed a morbidly obese employee unable to perform her job as an institutional attendant. *Id.* at 20. The court held that

> denying an applicant even a single job that requires no unique physical skills, due solely to the perception that the applicant suffers from a physical limitation[s] that would keep her from qualifying for a broad spectrum of jobs, can constitute treating an applicant as if her condition substantially limited a major life activity, *viz.*, working.

Id. at 26.

3. The Tenth Circuit is in discord with both approaches by other circuits

The above-referenced cases consider a plaintiff's employability at a facility as evidence of "regarded as disabled." In the present case, the Tenth Circuit

adopted neither approach, and gave essentially no weight to the belief Dillon was unable to work for MCC.

> Thus, while a jury could infer that Mountain Coal considered Mr. Dillon as substantially limited in his ability to work at West Elk Mine, there was no evidence that MCC regarded him as substantially limited in his ability to work outside of West Elk Mine, or that the jobs within the mine could properly be characterized as a 'class of jobs' or a 'broad range of jobs.'

Tenth Circuit Opinion, pg. 10-11.

The Tenth Circuit held Dillon to a different requirement than any other circuit to rule upon the issue. Dillon was perceived as unable to perform the most basic job of lube man, which only required lifting fifteen pounds. Dillon performed manual labor for MCC and had access to blue-collar jobs. Under the holdings of *Rodriguez* and *Cook*, Dillon's perceived inability to do the job of lube man would result in his exclusion from mining as well as a broad range of manual labor jobs.

Alternatively, Dillon's perceived inability to work *any* job at the mine showed MCC regarded him as disabled. Neither the Third, Sixth or Eleventh Circuit required a plaintiff to show that the variety of jobs at a facility constituted a "broad range." Similar to *Buskirk*, *DuPont* and *D'Angelo*, work at MCC was made up of a variety of manual labor jobs. Yet, unlike the other circuits, the Tenth held the perception Dillon was unable to work any jobs at MCC did *not* raise an inference he was

regarded as disabled. The Tenth Circuit even failed to give credence to Dillon's evidence of his subsequent position at another mine. Opinion, pg. 12. The Tenth Circuit's requirement that there be a direct comparison with jobs held at other mines goes beyond the requirements imposed by other circuits.

B. The Tenth's Circuit's Position is Not Well Reasoned

As noted elsewhere, a claim that the plaintiff is regarded as disabled calls for a subjective determination of the employer's state of mind. Logically, absent evidence the facility is unique, a belief an employee can do no job in a facility permits an inference he can do no job in the industry. Likewise, a belief the employee cannot perform a basic or slow-effort job permits an inference the employee cannot perform a higher-level or more strenuous job.

The court's refusal to consider Dillon's perceived inability to work his job, or any other, at the mine conflicts with this Court's rulings regarding inferential evidence. This Court has repeatedly held that one need not prove discrimination claims with direct evidence. *USPS v. Aikens*, 460 U.S. 711, 714 (1983) *see also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003). A requirement of direct comparison is a step toward a direct evidence requirement, and does not permit the jury to rely on reasonable inferences. In opposition to multiple other circuits, the Tenth has taken the teeth out of the ADA with an oppressive evidentiary requirement. This discrepancy should be addressed.

C. The Discrepancy Among Circuits Must be Resolved by This Court

It is important that the Court determine the evidentiary value of an actual or perceived inability to work any job in a facility. For regarded-as-disabled claims, there are innumerable cases continuing in the system for which guidance is essential. However, even under the ADAAA, this is an important question. The ADAAA confirmed working is a major life activity, but did not change the definition of "working." A future plaintiff may have a past record of being unable to work at any job in the facility. A future plaintiff may also be actually unable to work at any job in the facility, at least without a corrective device. Even under the ADAAA, the circuits would reach different conclusions as to these type plaintiffs. Thus, review by this court is needed.

V. This Court Should Resolve The Circuit Split And Determine That A Full Release Policy Is Evidence That A Restricted Employee Is Regarded As Disabled

A. The Circuit Courts Are Divided on the Evidentiary Value of a Full Release Policy

Multiple circuits have developed divergent case law regarding the use of a full release or 100 percent healed policy as evidence of whether an employee is regarded as disabled under the ADA. Such a policy is a blanket rule promulgated by an employer that no employee may work with any medical or physical restrictions whatsoever. Circuit courts' treatment of these policies runs a wide gamut, producing inconsistent rules and

essentially changing the evidentiary requirements from one circuit to the next. This Court must rectify the discrepancy with a single position on full release policies and their evidentiary value.

On one end of the spectrum, the Ninth Circuit has held that a full release policy is a *per se* violation of the ADA. *McGregor v. National Railroad Passenger Corporation*, 187 F.3d 1113 (9th Cir. 1999). There, an Amtrak ticket agent injured her arm and was no longer able to handle baggage and packages with her lifting restrictions. *Id.* at 114. She testified that she inquired extensively into other jobs, and was told that Amtrak would not accept her bid until she was "100% healthy." *Id.* at 115. The court of appeals ruled that such a policy was a *per se* violation of the ADA.

> A '100% healed' or 'fully healed' policy discriminates against qualified individuals with disabilities because such a policy permits employers to substitute a determination of whether a qualified individual is '100% healed' from their injury for the required individual assessment whether the qualified individual is able to perform the essential functions of his or her job either with or without accommodation.

Id. at 1116.

In addition to holding that a full release policy is a per se ADA violation, the Ninth Circuit has also stated that such a policy is evidence that an employer regards an employee as disabled for purposes of the ADA.

Proving that an employer regards the employee as significantly restricted in the major life activity of working requires an inquiry into the employer's state of mind. "Proving that an employee is regarded as disabled in the major life activity of working takes a plaintiff to the farthest reaches of the ADA. It is a question embedded almost entirely in the employer's subjective state of mind." *Ross v. Campbell Soup Co.*, 237 F.3d 701, 709 (6th Cir. 2000).

The Ninth Circuit has ruled that a full release policy can be evidence of the employer's subjective state of mind. *Johnson v. Paradise Valley Unified School District*, 251 F.3d 1222, 1128 (9th Cir. 2000). There, a groundkeeper for a school district severely injured her leg on the job, and was eventually cleared to return to work with restrictions. Her employer informed her, "We don't take limited releases." *Johnson*, 251 F.3d at 1224. The court of appeals held, "[T]hat policy supports an inference that the District regarded Johnson, and other injured employees, as unable to perform any job." *Id.* at 1228. The Ninth Circuit thus affirmed the jury's verdict in favor of the plaintiff on her regarded-as-disabled claim.

Though not as sweeping as the Ninth Circuit's rule, the approach of the Sixth Circuit also closely scrutinizes full release policies. In *Henderson v. Ardco*, 247 F.3d 645, 647 (6th Cir. 2001), a manufacturing facility implemented a well-known and consistently applied "100% healed rule". A plaintiff with a back injury and lifting restrictions claimed that Ardco perceived her as having a disability, and that the full release policy was *per se* discriminatory. *Id.* at 648. The court found that a

per se approach "foreshortens the inquiry," because it was imperative to first establish that the plaintiff was in fact disabled under the ADA. *Id.* at 653. "On summary judgment, though, the importance of the 100% policy is its role in determining the threshold issue of perceived disability." *Id.* The evidence showed Ardco had many jobs at its plant, some within the plaintiff's restrictions. *Id.* at 648. The court found that Ardco's 100 percent rule could be interpreted as treating the plaintiff as incapable of work in a manufacturing operations. *Id.* at 652. This was sufficient to raise a question of fact as to whether she was regarded as unable to work in a class of jobs. *Id.* at 652. For this reason, the Sixth Circuit overturned the grant of summary judgment to the defendant.

The Third Circuit gives less credence to a full release policy as evidence of discrimination. In *Hohider v. UPS*, 574 F.3d 169, 192 (3rd Cir. 2009), the court declined to follow the Ninth Circuit's rule that a 100 percent healed policy is a *per se* violation of the ADA. "Even if we adopt that theory, we do not believe plaintiffs can reach a determination under the ADA by proving only the existence of a '100% healed' policy, without any inquiry whether that policy has been used to discriminate against individuals protected by the ADA from such discrimination." *Id.* at 195.

Finally, the Tenth Circuit occupies the pole at the opposite end of the spectrum from the Ninth. In the instant case, the court of appeals gave virtually no weight to Jared Dillon's evidence of MCC's full release policy. In direct opposition to *Johnson* and *Henderson*, supra, the court held that the policy was not evidence

that the employer regarded Dillon as significantly restricted in the major life activity of work.

> The policy, however, only speaks to whether Mountain Coal regarded Mr. Dillon as substantially limited in his ability to work at West Elk Mine. The policy does not reveal the 'number and types of jobs utilizing similar training, knowledge, skill or abilities' in the geographic area, as the EEOC regulations require.

Tenth Circuit Opinion, pg. 9. "Mountain Coal's no-restrictions policy also does not, by itself, support a finding that Mountain Coal regarded Mr. Dillon as unable to perform a broad range of jobs in various classes in the geographic area." Tenth Circuit Opinion, pg. 10.

The Tenth Circuit's opinion stands in direct contrast to *Henderson* and *Johnson*. All three cases involve a 100% healed policy. All three involve an employer with many jobs. They all involve a restricted employee, but jobs available within the employee's restrictions. Yet only the Tenth Circuit held that there is no inference the employee is regarded as disabled. Among the circuits which have expressly ruled upon full release policies, including the Ninth, Sixth and Tenth Circuits, courts of appeals are producing an array of conflicting opinions.

B. The Approach of the Ninth and Sixth Circuits Advances the Intent of the ADA

A blanket rule that anyone with a physical or medical restriction is unemployable is facially discriminatory against those with disabilities. Thus, this Court should rule in accordance with the Ninth and Sixth Circuits, and the myriad of lower courts that have held that such a policy is evidence of discrimination, if not a per se violation of the ADA.

A staunch refusal to evaluate an employee individually or make a good-faith attempt at accommodations is "insensitive and repugnant." *Henderson*, 247 F.3d at 649 (quoting the district court's opinion.) "Under the ADA, 'individualized assessment is absolutely necessary if persons with disabilities are to be protected from unfair and inaccurate stereotypes and prejudices.'" *McGregor*, 187 F.3d at 1116, quoting *Sarsycki v. United Parcel Service*, 862 F.Supp. 336, 341 (W.D. Okla. 1994). The EEOC has adopted the policy that full release policies are per se unlawful. "The ADA prohibits an employer from requiring that 'an employee with a disability-related occupational injury be able to return to full duty before allowing him/her to return to work.'" EEOC Enforcement Guidance: Workers' Compensation and the ADA, No. 915.002 at 8-9 (1996). This Court should find that a full release policy is, *per se*, a violation of the ADA. At a minimum, this Court should hold such a policy is evidence that an employer regards an employee as substantially restricted in the major life activity of working. It is a logical inference that if an employer will not allow an employee with physical restrictions to work, that employer regards that

employee as significantly restricted in the major life activity of working. This is especially true as in cases like Dillon's and *Henderson* where the employer has many jobs, including jobs within the plaintiff's restrictions.

C. This Court Must Rectify the Discrepancy Between Circuits

The discrepancy among circuits will continue to create inconsistent rulings. Regardless of the recent amendments to the ADA, thousands of cases filed under the former version are still awaiting resolution at the EEOC level or working up through the courts.

It is unjust that one plaintiff will be able to prove a *per se* violation of the ADA with a full release policy, and another will be unable to use it as evidence his employer regarded him as disabled, based upon which court rules on the case. It is incumbent upon this Court to resolve the discrepancy and promulgate one rule regarding full release policies to be applied universally to ADA plaintiffs.

CONCLUSION

Dillon has presented four issues for review. All four represent important issues for ADA plaintiffs and defendants alike. The first three issues remain relevant under the ADAAA, while the fourth is important due to the repugnance of full release policies to the ADA. Despite the importance of all four issues, a contrary determination on any one of them will result in affirming the jury's verdict and reversing the Tenth Circuit's opinion. Therefore, Dillon requests that this court grant the writ of certiorari on one or more of the issues presented.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED JUNE 23, 2009

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

No. 08-1004

JARED L. DILLON,

Plaintiff - Appellant,

v.

MOUNTAIN COAL COMPANY, L.L.C.; ARCH WESTERN RESOURCES, L.L.C., a Delaware Corporation; ARCH COAL, INC., a Delaware Corporation,

Defendants - Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D. Ct. No. 1:01-CV-02199-MSK-MEH)

Before **TACHA**, **SEYMOUR**, and **HOLMES**, Circuit Judges.

TACHA, Circuit Judge.

Jared Dillon, a former employee of Mountain Coal Company, L.L.C., won a jury verdict against Mountain Coal and its parent companies (collectively, "Mountain

Coal") on his claims of discrimination under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 et seq. Thereafter, the district court granted Mountain Coal's motion for judgment as a matter of law, concluding that Mr. Dillon had not put forth sufficient evidence to show that Mountain Coal regarded him as disabled. Mr. Dillon appeals. We have jurisdiction under 28 U.S.C. § 1291, and we AFFIRM.

I. BACKGROUND

In March 1999, Mountain Coal hired Mr. Dillon as an underground maintenance mechanic, or "lube man," at West Elk Mine. Mr. Dillon testified that his responsibilities included "keep[ing] the essential fluids, hydraulic, gear oil . . . [and] so forth, at an operable level on the machinery; greasing, washing, and maybe replacing a few minor bits here and there." The official job requirements included being able to lift fifty to sixty pounds and being able to swing a sledgehammer.

On April 19, 1999, Mr. Dillon injured his neck and back when the cover on a mining machine fell and struck him. He returned to work on his next scheduled workday, April 23, but told his supervisor, Bob Turner, that he was in a lot of pain. Mr. Turner assigned Mr. Dillon to less physically demanding tasks, such as refueling and servicing trucks. Mr. Dillon saw a doctor on April 30 and again on May 5, and the doctor restricted Mr. Dillon's work activities to lifting no more than fifteen pounds. The doctor also referred Mr. Dillon to a second

doctor, who restricted Mr. Dillon from doing any work for one week, and then released him to work without restrictions.

The second day after he had returned to work, on June 2, Mr. Dillon told supervisor Steve O'Connell that he was in a lot of pain and that his inability to work at his usual speed might endanger himself and others. Mr. O'Connell told Mr. Dillon to go home, and he did. After that day, Mr. Dillon did not return to work at West Elk Mine. That fall, Dr. Robert Fox determined that Mr. Dillon was able to move well and that he had reached "maximum medical improvement." On January 12, 2000, Dr. Fox gave Mr. Dillon permanent lifting restrictions of no more than fifty pounds maximum and twenty-five pounds occasionally.

Mr. Dillon testified that he twice called Human Resources Manager Edgar Langrand to ask when he could return to work. Mr. Langrand responded that Mr. Dillon could return to work only if and when he had no restrictions. On January 24, Mr. Langrand sent Mr. Dillon a letter, informing him that according to Dr. Fox's reports and recommended lifting restrictions, Mr. Dillon was unable to work. The letter also stated that Mr. Dillon's short-term disability period had expired and that because he was unable to return to work, he was being fired.

Eventually, Mr. Dillon and three co-plaintiffs filed suit against Mountain Coal, asserting state-law claims as well as discrimination under the ADA. After Mountain

Coal filed a pre-trial motion for summary judgment, the district court dismissed two plaintiffs and limited Mr. Dillon and co-plaintiff Michael Clawson to their claims under the ADA. At the close of the plaintiffs' case, Mountain Coal orally moved for judgment as a matter of law under Fed. R. Civ. P. 50(a), based primarily on its argument that the plaintiffs failed to prove that Mountain Coal regarded them as disabled. *See* 42 U.S.C. § 12102(1)(C). The court reserved ruling on the motion, and at the close of all evidence Mountain Coal renewed the motion without further argument. The district court reserved ruling on the motion until after the jury had rendered a verdict. The jury found for both plaintiffs. Mountain Coal then renewed its motion for judgment as a matter of law under Rule 50[1] and filed a detailed brief in support of the motion. The district court granted the motion as to Mr. Dillon, but denied the motion as to Mr. Clawson. *Clawson v. Mountain Coal Co.*, No. 01-CV-02199-MSK-MEH, 2007 WL 201253, at * 10 (D. Colo. Jan. 24, 2007).[2]

Mr. Dillon appeals, asserting three points of error. Of primary importance, he contends that the district court erred in holding that there was insufficient evidence for a reasonable jury to find that Mountain Coal regarded Mr. Dillon as disabled. He further argues

1. Mountain Coal characterizes the new motion as a renewed motion under Rule 50(a). Mr. Dillon characterizes it as a Rule 50(b) motion. We agree with Mr. Dillon's conception, but his characterization does not affect our analysis.

2. Mr. Clawson and Mountain Coal subsequently settled.

that Mountain Coal's motion for judgment as a matter of law was legally insufficient because it did not identify the specific evidence that he had failed to present. Finally, Mr. Dillon asserts that the district court abused its discretion in excluding certain testimony.

II. DISCUSSION

A. *"Regarded-As" Claims Under the ADA*

The ADA prohibits employment discrimination against individuals with disabilities. 42 U.S.C. § 12112(a).[3] As defined by the ADA, a disability is "(A) a physical or mental impairment that substantially limits one or more major life activities . . . ; (B) a record of such an impairment; or (C) being regarded as having such an impairment. . . ." *Id.* § 12102(1)(A)-(C). Where, as in this case, the plaintiff contends that his employer regarded him as disabled, he must show that he has an impairment that "does not substantially limit major life activities but is treated by a covered entity[4] as

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3. The current version of the ADA prohibits discrimination against "a qualified individual on the basis of disability. . . ." 42 U.S.C. § 12112(a). The version of the ADA that was law when this suit was filed prohibited discrimination "against a qualified individual with a disability because of the disability of such individual. . . ." 42 U.S.C. § 12112(a) (2002). The change in the statute's wording does not affect our analysis in this case.

4. It is undisputed that Mountain Coal is a covered entity for purposes of the ADA. *See* 42 U.S.C. § 12111(2) ("The term 'covered entity' means an employer. . . .").

constituting such limitation." 29 C.F.R. § 1630.2(*l*)(1).[5] *See also Jones v. United Parcel Serv., Inc.*, 502 F.3d 1176, 1190 (10th Cir. 2007) (in a regarded-as suit, "a plaintiff must show that an employer has mistaken beliefs about the plaintiff's abilities: the employer 'must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.' ") (quoting *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489 (1999)).

Working is a "major life activity." 29 C.F.R. § 1630.2(i); *EEOC v. Heartway Corp.*, 466 F.3d 1156, 1162 (10th Cir. 2006). To prevail on a claim that his employer regarded him as substantially limited in the major life activity of working, a plaintiff must demonstrate that his employer regarded him as significantly restricted in performing either (1) a class of jobs; or (2) a broad range of jobs in various classes. *See Heartway*, 466 F.3d at 1163 (holding that "there must be sufficient evidence that the employer *subjectively* believed the employee to be significantly restricted as to a class of jobs or broad

5. Equal Employment Opportunity Commission ("EEOC") regulations explain that "although an individual may have an impairment that does not in fact substantially limit a major life activity, the reaction of others may prove just as disabling. 'Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment.' " 29 C.F.R. pt. 1630 app. (quoting *School Bd. v. Arline*, 480 U.S. 273, 283 (1987)).

range of jobs in various classes."). The EEOC's regulations define a "class of jobs" as "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." 29 C.F.R. § 1630.2(j)(3)(ii)(B). A "broad range of jobs" is defined as "[t]he job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment." *Id.* § 1630.2(j)(3)(ii)(C).

We therefore evaluate a "regarded as" claim under the ADA using a two-step inquiry. First, we must determine whether the employer regarded the employee as significantly restricted in performing his specific job because of an impairment. *See Heartway*, 466 F.3d at 1165. Next, we determine whether the employer subjectively believed that the employee was significantly restricted in performing either a class of jobs or a broad range of jobs in various classes. *Id.* at 1163. Because this type of claim rests heavily on the employer's subjective state of mind, we have explained that it is difficult to prove:

> Proving that an employee is regarded as disabled in the major life activity of working takes a plaintiff to the farthest reaches of the ADA. It is a question embedded almost

> entirely in the employer's subjective state of mind. Thus, proving the case becomes extraordinarily difficult. Not only must a plaintiff demonstrate that an employer thought he was disabled, he must also show that the employer thought that his disability would prevent him from performing a broad class of jobs. As it is safe to assume employers do not regularly consider the panoply of other jobs their employees could perform, and certainly do not often create direct evidence of such considerations, the plaintiff's task becomes even more difficult.

Id. at 1162 (quoting *Ross v. Campbell Soup Co.*, 237 F.3d 701, 709 (6th Cir. 2001)).

B. *Sufficiency of the Evidence*

We review de novo the district court's grant of judgment as a matter of law to Mountain Coal. *See Johnsen v. Indep. Sch. Dist. No. 3*, 891 F.2d 1485, 1489 (10th Cir. 1989). Judgment as a matter of law is appropriate when a "party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed.R.Civ.P. 50(a)(1). The decisive question is whether "the plaintiff has arguably proven a legally sufficient claim." *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1241 (10th Cir. 2001).

Appendix A

In evaluating Mr. Dillon's "regarded as" claim under the ADA, we must first determine whether Mountain Coal regarded Mr. Dillon as substantially limited in performing his specific job due to an impairment. *See Heartway,* 466 F.3d at 1165. We agree with the district court that Mr. Dillon offered sufficient evidence that, due to his injuries and resultant work restrictions, Mountain Coal regarded him as substantially limited in performing that job. *See Clawson,* 2007 WL 201253, at *7. During the relevant time frame, Mountain Coal had enacted a so-called "no restrictions" or "100% healed" policy. Under that policy, Mountain Coal would not permit any employee with medical restrictions from working in any capacity at the mine. Although Mountain Coal put forth some evidence that it did not categorically apply the policy (and therefore did not terminate Mr. Dillon solely because of his restrictions), we are required to view the evidence in the light most favorable to the verdict. The jury was entitled to believe that Mountain Coal enforced its policy as to Mr. Dillon. Mr. Dillon also produced the letter in which Mountain Coal announced that it was terminating him. That letter specifically referenced Mr. Dillon's work restrictions as a reason for firing him.

Still, Mr. Dillon must also show that Mountain Coal regarded him as substantially limited in his ability to perform either a class of jobs or a broad range of jobs in various classes, in the geographic area surrounding West Elk Mine. On this point, Mr. Dillon again emphasizes Mountain Coal's "no restrictions" policy.

That policy, Mr. Dillon argues, shows that Mountain Coal regards Mr. Dillon as substantially limited in performing mining jobs.

The policy, however, only speaks to whether Mountain Coal regarded Mr. Dillon as substantially limited in his ability to work at West Elk Mine. The policy does not reveal "the number and types of jobs utilizing similar training, knowledge, skill or abilities" in the geographic area, as the EEOC regulations require. 29 C.F.R. § 1630.2(j)(3)(ii)(B). Mr. Dillon did not put on other evidence describing the jobs available in the area that fell into the class of "mining jobs," nor did he produce evidence demonstrating that mining jobs are, in fact, a class of jobs. He therefore produced no evidence from which a reasonable jury could conclude that Mountain Coal regarded him as substantially limited in the ability to perform a class of jobs.

Mountain Coal's no-restrictions policy also does not, by itself, support a finding that Mountain Coal regarded Mr. Dillon as unable to perform a broad range of jobs in various classes in the geographic area. *See id.* § 1630.2(j)(3)(ii)(C). Again, the policy only speaks to the jobs at West Elk Mine, and Mr. Dillon did not produce evidence describing the jobs available in the area. We have stated that a single place of employment could include a "broad range of jobs in various classes." *See Justice v. Crown Cork & Seal Co.*, 527 F.3d 1080, 1088 (10th Cir. 2008) (holding that because the employer believed the plaintiff "could only do one or two jobs among the variety of jobs in the plant," the jury could

find that the employer believed he was "unable to perform a broad range of jobs in various classes.") (quotations omitted). However, Mr. Dillon did not produce evidence showing that, within West Elk Mine, there is a broad range of jobs in various classes that do *not* utilize "similar training, knowledge, skills or abilities" as the jobs Mr. Dillon performed at the mine. *See* 29 C.F.R. § 1630.2(j)(3)(ii)(C). His evidence shows only that West Elk Mine had a variety of mining jobs. He did not show that those jobs fell into different classes, or that the jobs would require different skills and training from Mr. Dillon's job at the mine.

Thus, while a jury could infer that Mountain Coal considered Mr. Dillon as substantially limited in his ability to work at West Elk Mine, there was no evidence that Mountain Coal regarded him as substantially limited in his ability to work outside of West Elk Mine, or that the jobs within the mine could properly be characterized as a "class of jobs" or a "broad range of jobs."

Mr. Dillon cites *McKenzie v. Dovala*, 242 F.3d 967 (10th Cir. 2001), to support his argument that an employer's belief that an employee cannot perform any job in the company is sufficient to meet the employee's evidentiary burden. We disagree that *McKenzie* stands for that proposition. The issue in *McKenzie* was whether there was evidence that the plaintiff's former employer—the county sheriff's office—regarded her as limited in her ability to perform only her prior job, or whether her employer regarded her as limited in

performing a class of jobs that we characterized as "law enforcement jobs." *Id.* at 970-71. We did not hold, as Mr. Dillon suggests, that an employer's refusal to rehire the plaintiff constitutes evidence that the jobs at the company necessarily qualify as a "class of jobs" or "broad range of jobs."

Mr. Dillon also points to evidence that Mountain Coal's safety representative told his co-plaintiff, Mr. Clawson, that he "probably would not be returning to the mining industry." *Clawson*, 2007 WL 201253, at *4. Because Mr. Clawson also had work restrictions, Mr. Dillon argues that the statement shows that Mountain Coal regarded Mr. Dillon as similarly limited. We do not agree. The statement was directed toward Mr. Clawson alone. Mr. Clawson and Mr. Dillon suffered from different injuries and were under different work restrictions. Mr. Dillon's restrictions involved heavy lifting, while Mr. Clawson's involved driving. A jury could not reasonably infer from this comment that Mountain Coal believed Mr. Dillon was similarly limited in his ability to perform mining jobs.[6]

Mr. Dillon argues that he and Mr. Clawson later found positions at two nearby mines, and that their employment was evidence that jobs similar to those at West Elk Mine were available in the geographic area. However, without additional evidence regarding the two men's specific jobs at those mines, a jury

6. Of course, as we explained, Mr. Dillon also failed to establish that "mining jobs" constitute a class of jobs.

could not conclude that those jobs "utiliz[ed] similar training, knowledge, skills or abilities" as the job Mr. Dillon performed at West Elk Mine. 29 C.F.R. § 1630.2(j)(3)(ii)(B).

Citing authority from the Sixth Circuit, Mr. Dillon argues that Mountain Coal's reasons for firing him were pretextual, which is evidence that Mountain Coal regarded him as disabled. *See Ross v. Campbell Soup Co.*, 237 F.3d 701, 708 (6th Cir. 2001). Mountain Coal, however, has not claimed that the lifting restrictions played no role in Mr. Dillon's firing. Mountain Coal has disputed whether it categorically applies its "no-restrictions policy," but has not given any alternative reason for firing Mr. Dillon. Thus, Mountain Coal cannot be said to have created a pretextual reason for firing him.

We conclude, therefore, that Mr. Dillon did not produce evidence to establish that Mountain Coal regarded him as substantially limited in his ability to perform either a class of jobs or a broad range of jobs in various classes, in the geographic area surrounding West Elk Mine. The evidence was not sufficient to support the jury's verdict.

C. *The Rule 50 Motion*

Mountain Coal's motion for judgment as a matter of law satisfied the requirements set forth under Federal Rule of Civil Procedure 50. A motion for judgment as a matter of law "must specify the judgment sought and

the law and facts that entitle the movant to the judgment." Fed. R. Civ. P. 50(a)(2). We consider the sufficiency of Mountain Coal's pre-verdict Rule 50 motion in isolation from arguments it raised for the first time in its renewed post-verdict Rule 50 motion. *See Marshall v. Columbia Lea Reg'l Hosp.*, 474 F.3d 733, 738-39 (10th Cir. 2007) (stating that a renewed post-verdict motion for judgment as a matter of law cannot assert grounds for relief that are not asserted in the original pre-verdict motion). Thus, the issue is whether Mountain Coal's Rule 50 motion at the close of the plaintiffs' case was sufficient.

In evaluating the sufficiency of a Rule 50 motion, we liberally construe Rule 50's requirements. *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1228 (10th Cir. 2000). "Technical precision is unnecessary." *Id.* We apply Rule 50 rigidly only when necessary to protect a party's right to a jury trial or to ensure that a party has notice of an evidentiary deficiency. *Id.* at 1228-29. The motion must be specific enough "to apprise the court and opposing counsel of the movant's position with respect to the motion." *Id.* at 1229 (quoting 9A Charles Alan Wright & Arthur R. Miller, Fed. Practice & Procedure § 2533 (1995)).

Mr. Dillon asserts that, because Mountain Coal's Rule 50 motion did not specifically discuss Mr. Dillon's lack of evidence regarding the job market surrounding West Elk Mine, the motion did not "specify . . . the law and facts that entitle the movant to the judgment." *See* Fed. R. Civ. P. 50(a)(2). In its motion, Mountain Coal

argued that it was the plaintiffs' burden to demonstrate that Mountain Coal regarded them as substantially limited in the major life activity of working, in either a class of jobs or in a broad range of jobs. Additionally, Mountain Coal contended that "[t]he focus [of the plaintiffs' evidence] was on the restrictions and on the jobs at Mountain Coal, and there is no evidence that Mountain Coal believed that they couldn't do jobs in other industries at other mines anywhere outside of the property at West Elk."

Mountain Coal also referenced Jury Instruction No. 12, which identified the requirements for determining that an employee was regarded by his employer as being substantially limited in the ability to perform either a "class of jobs" or a "broad range of jobs."[7] After referencing this instruction, the attorney defined both a "class of jobs" and a "broad range of jobs," based on the EEOC's guidelines. Both definitions made reference to the jobs available in the geographic area.

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7. We recognize that Mountain Coal was addressing Mr. Clawson's case when explaining the legal requirements for a "regarded as" claim under the ADA. However, because Mr. Dillon argued similar claims, and both plaintiffs bore the burden of demonstrating that Mountain Coal regarded them as disabled, any statement as to the requirements for a successful ADA claim put both plaintiffs on notice as to the evidentiary requirements. Mountain Coal also made it clear that it believed Mr. Dillon had not produced the evidence necessary to support a "regarded as" ADA claim.

We disagree with Mr. Dillon's contention that the motion gave him inadequate notice about the deficiency in his evidence. Mountain Coal established that the plaintiffs were required to put on evidence that Mountain Coal regarded the plaintiffs as substantially limited in performing either a "class of jobs" or a "broad range of jobs in various classes." Mountain Coal defined those terms, making it clear that the plaintiffs would need to provide evidence about other jobs in the area to prevail on their claims. In addition, the district court stated that it was "seriously concerned that the record . . . is inadequate to establish the requirements for a regarded as claim under the ADA." We therefore conclude that Mountain Coal's Rule 50 motion gave the plaintiffs adequate notice regarding the evidence that they needed to produce, and informed both the plaintiffs and the court about "the movant's position with respect to the motion." *United Int'l*, 210 F.3d at 1228-29. Accordingly, the motion met Rule 50's requirement that it "specify the judgment sought and the law and facts that entitle the movant to the judgment." Fed. R. Civ. P. 50(a)(2).

D. *Excluded Testimony*

Finally, we reject Mr. Dillon's argument that, if we conclude his evidence was insufficient, we should remand for a new trial based on the court's erroneous exclusion of certain testimony. We review evidentiary rulings for an abuse of discretion. *United States v. Rogers*, 556 F.3d 1130, 1136 (10th Cir. 2009). The district court did not allow Mr. Clawson to respond when asked

how miners were classified at a mine near West Elk. The court also did not allow John Ballard, a former Mountain Coal employee, to testify as to his position at a second nearby mine. Mr. Dillon asserts that this testimony could have given the jury information about jobs in that area that required similar skill or training as the jobs at West Elk Mine. In neither case, however, did Mr. Dillon's attorney assert that argument when confronted with the objection. Therefore, the issue was not preserved for appeal. *See United States v. Martinez*, 776 F.2d 1481, 1485 (10th Cir. 1985) (holding that an issue is not properly preserved for appeal when an attorney asserted different grounds for allowing evidence at trial and on appeal, and when no offer of proof was made). The district court also did not abuse its discretion when it limited the testimony of the two co-plaintiffs who were dismissed on summary judgment. There is no indication that they could have provided the evidence that Mr. Dillon lacked regarding the job market in the area surrounding West Elk Mine.

III. CONCLUSION

We agree with the district court's determination that Mr. Dillon produced insufficient evidence from which a reasonable jury could conclude that Mountain Coal regarded Mr. Dillon as disabled. We also hold that Mountain Coal's motion for judgment as a matter of law complied with Rule 50, and that the district court did not abuse its discretion in limiting the testimony of certain witnesses. Accordingly, we AFFIRM the district court's grant of judgment as a matter of law to Mountain Coal.

APPENDIX B — OPINION AND ORDER GRANTING, IN PART, DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED JANUARY 24, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger

Civil Action No. 01-cv-02199-MSK-MEH

Michael E. CLAWSON, and JARED L. DILLON,

Plaintiffs,

v.

MOUNTAIN COAL COMPANY, L.L.C., ARCH WESTERN RESOURCES, L.L.C. a Delaware corporation, and ARCH COAL, INC., a Delaware corporation,

Defendants.

OPINION AND ORDER GRANTING, IN PART, DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW

Appendix B

THIS MATTER comes before the Court pursuant to the Defendants' oral motion[1] for judgment as a matter of law, made during trial, and the Plaintiffs' oral response; the Plaintiffs' Motion for Assessment and Award of Punitive Damages or for Additur (# 418), the Defendants' response (# 434), and the Plaintiffs' reply (# 438); the Plaintiffs' Motion for Entry of Judgment (# 419), the Defendants' response (# 433), and the Plaintiffs' reply (# 439); Plaintiff Jared Dillon's Motion for Award of Front Pay (# 421), the Defendants' response (# 431), and Plaintiff Dillon's reply (# 437); the Plaintiffs' Motion for Back Pay and Interest (# 422),[2] the Defendants' response (# 436), and the Plaintiffs' reply (# 442); and the Defendants' Motion for Application of Statutory Damage Cap and for

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1. Subsequent to the trial, the parties filed briefs (# 420, 432) in further support of the motion.

2. Shortly after filing this motion, the Plaintiffs filed a "Notice of Error" and Motion to Amend (# 425) the original motion to correct a miscalculation of accumulated interest. Thereafter, the Plaintiffs filed three additional Motions to Amend (# 426, 428, 429) the original motion. It is difficult to discern the precise status of the various motions to amend from the various docket entries regarding them. To simplify the matter, the Court will deny the intervening motions to amend (# 425, 426, 428) as moot, and grant the last motion to amend (# 429) insofar as the Court will deem the original motion (# 422) to be supplemented by the revised interest calculations.

Appendix B

Reduction of Advisory Back Pay Awards (# 423), the Plaintiffs' response (# 435), and the Defendants' reply (# 441).[3]

FACTS

A. Generally

Because the motions at issue concern relatively circumscribed issues arising from the evidence received at trial, a detailed recounting of this case's extensive procedural history is unnecessary.

In summary, the facts are as follows. Plaintiffs are former employees of Defendant Mountain Coal Co.'s West Elk Mine. During 1999 and 2000, both Plaintiffs suffered on-the-job injuries, and were given certain work restrictions by their doctors. Eventually, both Plaintiffs reached a condition of maximum medical improvement, but remained subject to some work restrictions. At the time of the Plaintiffs' injuries, Mountain Coal maintained a policy of refusing to permit employees to return to work in any capacity at the West Elk Mine if the employee was subject to any medical restrictions.[4] As a

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3. Also pending are the Plaintiffs' unopposed Motion to Speak to Former Jurors (# 415), and the Plaintiffs' Motion to Clarify and Conditional Motion for Briefing and Briefing Schedule (# 416), the Defendants' response (# 417), and the Plaintiffs' reply (# 424). The former motion is granted, and the latter is denied as moot.

4. This proposition was hotly contested at trial. The Court will address it in more detail *infra*.

result, neither Plaintiff was permitted to return to work, and both were placed on short-term disability. After 26 weeks, when their short-term disability benefits were exhausted and they remained subject to medical restrictions, both Plaintiffs were terminated.

The Plaintiffs commenced this action asserting a variety of causes of action. In April 2006, the case proceeded to a jury trial on three claims: (i) a claim by Plaintiff Clawson that the Defendants violated the Americans With Disabilities Act, 42 U.S.C. § 12101 *et seq.* ("ADA"), by failing to reasonably accommodate his disability; (ii) a similar failure to accommodate claim by Plaintiff Dillon; and (iii) a claim by Plaintiff Dillon that his discharge constituted discrimination on the basis of disability in violation of the ADA. At the close of the Plaintiffs' case, the Defendants moved for judgment as a matter of law under Fed. R. Civ. P. 50(a), primarily that the Plaintiffs' evidence failed to establish that either Plaintiff suffered from a "disability" as that term is defined in 42 U.S.C. § 12102(2). The Court reserved ruling on this issue, and the Defendants put on their case. At the conclusion of the evidence, with the Court continuing to reserve ruling on the Rule 50 motion, the jury returned a verdict (# 407) in favor of both Plaintiffs on all counts, awarding Plaintiff Clawson economic damages of $236,000 and non-economic damages of $250,000, and awarding Plaintiff Dillon economic damages of $108,000 and non-economic damages of $250,000. Although the jury found that the factual predicate necessary for an award of punitive damages, it awarded no punitive damages to either Plaintiff.

B. The instant motions

The parties then filed the instant motions. The Defendants renewed their oral Rule 50 motion with a written brief (**# 420**), and the Plaintiffs responded (**# 432**). This motion will be discussed in more detail *infra*.

The Plaintiffs filed a Motion for Assessment and Award of Punitive Damages or for Additur (**# 418**), arguing that the jury's refusal to award any punitive damages was "inadequate and against the great weight of the evidence." Arguing that the Seventh Amendment to the United States Constitution does not prevent the Court from substituting its own judgment for that of the jury on the amount of punitive damages to be awarded, the Plaintiffs request a punitive damages award from the Court of $200,000 per Plaintiff.In the alternative, the Plaintiffs request that the Court engage in additur—that is, to grant the Plaintiffs a new trial unless the Defendants agree to an punitive damage award of $200,000.

The Plaintiff also moved for entry of judgment (**# 418**). This motion contains no legal argument and simply requests that Court enter judgment consistent with the Plaintiffs' other motions.

Plaintiff Dillon moved for an award of front pay (**# 421**) in lieu of reinstatement. He argues that his termination from subsequent employment warrants reducing, not eliminating, any front pay to which he

might be entitled. He requests an award of $58,039 in front pay, reflecting a disparity between his income had he remained employed at the West Elk mine and the income he would have earned through 2012, had he remained employed as his subsequent job.

Both Plaintiffs move separately for an award of back pay and interest (# 422). Acknowledging that the jury's verdict on economic damages was advisory, the Plaintiffs argue that the jury's verdict was correct and should be adopted by the Court. The Plaintiffs note that the jury's award of $236,000 in economic damages to Plaintiff Clawson exceeded the Plaintiffs' expert's opinion that Plaintiff Clawson suffered $235,431 in economic losses, but contend that the jury could have deemed the expert's opinions too conservative or awarded additional costs for miscellaneous expenses incurred by Plaintiff Clawson. The Plaintiffs also noted that the jury's award of $108,000 to Plaintiff Dillon was less than the Plaintiffs' expert's opinion that Plaintiff Dillon suffered more than $146,000 in economic losses, but acknowledge that the evidence supports the lower amount. The Plaintiffs argue that any backpay award should not be reduced by unemployment or Worker's Compensation payments they may have received, in part because such benefits are not properly deducted from wage awards in employment discrimination cases, and partly because the Plaintiffs' backpay calculations began only after they ceased receiving wage-based benefits under Worker's Compensation. In addition, they argue that the Court should not reduce a backpay award by the amount of short-term or long-term disability benefits they may

have received. The Plaintiffs further request prejudgment interest on both economic and non-economic awards at an interest rate of 8%.

The Defendants filed a Motion for Application of Statutory Damage Cap and for Reduction of Advisory Backpay Awards (# 421), arguing that: (i) the Plaintiffs' non-economic damages are capped at $200,000 by operation of 42 U.S.C. § 1981a(b); (ii) the Court should refuse to adopt the jury's advisory backpay award to the extent it is based on the Plaintiffs' expert's opinions because such opinions were premised upon incorrect assumptions or used incorrect and shifting methodologies[5]; (iii) that Plaintiff Clawson's economic award should be reduced by the value of short-term and long-term disability benefits he received, as well as by amounts he received as unemployment benefits; (iv) that prejudgment interest should not be awarded on any

5. Portions of the Defendants arguments on this point are supported by various affidavits and other documents that were not presented as evidence at trial. The Defendants argue (without citation to authority) that the Court has the discretion to consider this evidence when deciding whether to adopt the jury's advisory verdict on damages. The Court finds that considering additional evidence the Defendants chose not to present to the jury would negate any benefits of having the jury render an advisory verdict on damages. Rather than conduct a *de novo* determination of damages on an expanded record, the Court finds it more appropriate to assess the reasonableness of the jury's advisory award on the same record that the jury had, and thus declines to receive any additional evidence for the purpose of determining an appropriate backpay award.

non-economic damages; and (v) that the appropriate prejudgment interest rate is 4.9%, compounded annually.

ANALYSIS

A. Rule 50 motion

At the close of the Plaintiffs' case, the Defendants moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) on three grounds: (i) that the Plaintiffs had not come forward with sufficient evidence to establish that the Defendants regarded them as having a disability under the ADA; (ii) that the Plaintiffs had failed to adduce adequate evidence to support their assertion that all three Defendant corporations should be treated as a single employer; and (iii) that the Plaintiffs failed to establish that some of the open positions they claimed to be qualified to fill were, in fact, actually available at the relevant time.[6]

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6. The Court will not extensively address the last two grounds of the Defendants' motion herein. With regard to the single employer issue, the Court notes that the Defendants chose not to even address the issue in their written brief. In any event, the Court finds that there was sufficient evidence of integration among the Defendant entities to permit the jury to find that they operated as a single employer. With regard to the failure to prove that certain positions were open, this is not a matter upon which the Court can enter judgment on any of the Plaintiffs' claims, and thus, the motion is denied in that respect.

Appendix B

1. *Standard of Review*

A motion made under Fed. R. Civ. P. 50 is adjudicated under the same standards applicable to motions for summary judgment under Fed. R. Civ. P. 56. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). The Court must view all of the evidence in the record,[7] and draw all reasonable

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7. Ordinarily, the Court would consider the evidence in the record as it existed at the time it reserved ruling on the motion; *i.e.* it would evaluate the Defendants' motion in light of the record as it existed at the close of the Plaintiffs' case. The Plaintiffs argue that, by putting on evidence in their own case after Court reserved ruling on the oral motion made at the close of the Plaintiffs' case, the Defendants have waived any evidentiary defects in the Plaintiffs' case in chief that were subsequently addressed during the defense case. In support of this proposition, they cite *Peterson v. Hager*, 724 F.2d 851, 854 (10th Cir. 1984). In *Peterson*, the 10th Circuit incorporated a quotation form Wright & Miller's *Federal Practice and Procedure* that "Technically, a party waives his right to a directed verdict, if [the] motion is made at the close of his opponent's case, and thereafter he introduces evidence in his own behalf." *Id., citing* 9 Wright & Miller, *Federal Practice and Procedure* (Civil) § 2534. "[T]he moving party," the 10th Circuit explained, "had the choice of either standing on his original [Rule 50(a) motion at the close of the plaintiff's case] or proceeding with his case. Because Hager proceeded with his case and supplied the very evidence essential to proof of Peterson's damages, he waived any error in the denial of his initial motion." *Id.*

The Court need not address whether *Peterson* actually requires consideration of the entire trial record, as the Court

(Cont'd)

inferences in favor of the non-moving party—the Plaintiffs. *Id.* However, the Court may not make credibility determinations or weigh the evidence, as doing so would intrude upon the jury's role. *Id.* at 150-51. If the evidence is not sufficient for a reasonable jury to find for the Plaintiffs, the Defendants are entitled to judgment as a matter of law.

2. *Evidence*

Neither party has submitted a trial transcript in support or opposition to the Rule 50 motion, opting instead to proceed based upon their own recollections of the evidence that was received. For purposes of this ruling, the Court has endeavored to reconstruct the trial record by referencing its own notes and the unedited, real-time transcript created by the Court Reporter. It should come as no surprise that the parties' recollection and characterization of the evidence differs, sometimes starkly, from the evidence in the record. Where there was conflicting testimony on an issue, the Court has construed the evidence in the light most favorable to the Plaintiffs.

(Cont'd)

has reviewed the evidence presented in the Defendants' case in chief and the Plaintiffs' rebuttal case, and finds that the additional evidence presented therein did not materially modify the record as it existed at the close of the Plaintiffs' case, particularly when that record is viewed in the light most favorable to the Plaintiffs.

Appendix B

Plaintiff Clawson, then working as an Underground Production Miner, suffered a back injury in or about October 1998. For a period of time, he continued working on a light-duty assignment, primarily performing fuel hauling tasks. In January 1999, the Defendants abolished light-duty assignments, but Plaintiff Clawson's assignment was exempted from this policy change. In May 1999, the Defendants changed the policy again, this time eliminating all light-duty assignments, including Plaintiff Clawson's. At or about the same time, Plaintiff Clawson's doctor certified that he had reached maximum medical improvement, but he was still restricted[8] from driving a vehicle without shock absorbers over rough roads. Several members of the Defendants' management met with Plaintiff Clawson to discuss his restrictions. According to Plaintiff Clawson, Human Resources Manager Ed Langrand told him that there were no positions available to him at the mine so long as he had that restriction. Plaintiff Clawson was then advised to apply for short-term disability benefits.

In July 1999, Plaintiff Clawson returned to his doctor for clarification of his restrictions. He was accompanied by Safety Manager Allen (Bill) Olsen. Plaintiff Clawson's doctor instructed that Plaintiff Clawson continue to

8. There was some dispute at trial as to whether the advisement by Plaintiff Clawson's doctor was an actual restriction upon the work Plaintiff Clawson was allowed to do, or whether it was merely a recommendation that he refrain from doing so whenever possible. The precise characterization of the nature of this advisement is not material to the outcome of the motion.

avoid activities that aggravated his injury. At the conclusion of this meeting, Olsen made a comment to the effect that Plaintiff Clawson probably would not be returning to the mining industry. However, it is undisputed that, during the same meeting, Olsen consulted with Plaintiff Clawson's doctor about whether Plaintiff Clawson could perform a job in the warehouse that was currently open. Being advised by the doctor that Plaintiff Clawson would be able to perform the job as Olsen described it, Olsen instructed the Plaintiff to contact the mine if he wanted to be considered for the warehouse job.

Plaintiff Clawson applied for the warehouse job, and in August 1999, was interviewed by, among others, Harrison (Stanley) Hopper and Mary Stahl. There evidence was undisputed that neither Hopper or Stahl was aware that Plaintiff Clawson had suffered an injury or was subject to any work restrictions. Hopper ultimately decided not to give the warehouse job to Plaintiff Clawson, citing his belief that Plaintiff Clawson lacked the required qualifications. Hopper was not pressed to elaborate, and the record does not indicate what particular qualifications Hopper deemed Plaintiff Clawson to lack. In February 2000, having exhausted his 26 weeks of short-term disability benefits and being unable to return to his assigned position, Plaintiff Clawson was terminated.

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Plaintiff Dillon worked as an Underground Maintenance Mechanic or Lube Man[9] until he suffered a back injury in April 1999. In or about early May 1999, he returned to work, primarily assigned to fuel hauling duties, but he continued to experience pain. Plaintiff Dillon continued to consult doctors, received various work restrictions (and, at times, no restrictions whatsoever), and worked intermittently. On or about June 2, 1999, Plaintiff Dillon again left work due to ongoing pain, and informed his supervisor that he was refusing to return to work until he was "fixed." Plaintiff Dillon made several additional visits to doctors thereafter, and was repeatedly restricted from returning to work. Plaintiff Dillon did not contact the Defendants at any of these times, assuming that his doctors had passed along that information. By November 1999, Plaintiff Dillon's doctor concluded that he had reached maximum medical improvement, but he remained subject to a medical restrictions permitting him to engage in occasional lifting of up to 25 pounds, but no lifting in excess of 50 pounds. Although Plaintiff Dillon believed that his doctor communicated the nature of his final restrictions to the Defendants, nobody from the Defendants contacted him to discuss his restriction or

9. A large amount of testimony addressed whether, as the Defendants contended, there were only two job titles for underground employees—miner and mechanic—or whether, as the Plaintiffs argued, there were a myriad of additional job titles, including fuel hauler, lube man, "permissibility" (inspections), etc. Resolving the dispute as to what specific job titles existed is not necessary to address the Defendants' Rule 50 motion.

his prospects for future employment. Plaintiff Dillon was advised by letter on January 24, 2000 that his employment with the Defendants was terminated due to the expiration of his short-term disability leave and his continuing inability to return to his assigned job.

Both Plaintiffs were terminated pursuant to a policy maintained by the Defendants that provided for termination of employment if three factors were present. The first two factors—that the employee had exhausted his available short-term disability leave and had been certified by his doctor as having reached a state of maximum medical improvement—were not in dispute. The third factor, however, was the subject of extensive dispute and competing evidence. According to the Plaintiffs, an employee was marked for termination if his doctor issued any permanent work restrictions of any kind. The Plaintiffs' position was supported by at least two written personnel memos issued by the Defendants to employees, articulating a policy that an employee must have "no restrictions" before he would be allowed to return to work. *See e.g.* Ex. 105 ("No hourly employee will be able to return to work in any capacity until [the Defendants] receive[ ] a return to work slip stating that he/she may return to work with 'no restrictions.'"). The Defendants, on the other hand, insisted that the actual practice they followed examined whether an employee's medical restriction affected the employee's ability to perform the essential functions of his assigned job. The Defendants contended that the memos appearing to describe a blanket "no restrictions" policy were inartfully

worded, and that the plain language of the memos did not accurately describe the actual policy that they applied.

Because the Court views the evidence in the light most favorable to the Plaintiffs for purposes of evaluating the Defendants' Rule 50 motion, the Court assumes that the Plaintiffs' characterization of the policy-that the Defendants terminated any employee with permanent work restrictions without engaging in any further analysis-was the policy that was actually applied.

3. *Governing law*

The protections under the ADA are available only to individuals with "disabilit[ies]." 42 U.S.C. § 12112(a), § 12111(8). Under this statute, an individual is deemed to have a disability if one of three conditions is met: (i) the individual has a physical or mental impairment that substantially limits one or more major life activities; (ii) the individual has a record of having such an impairment; or (iii) the individual is regarded by the employer as having such an impairment. 42 U.S.C. § 12102(2). In determining whether an individual is disabled under any of the three definitions in the ADA, the central focus is on the individual's "major life activities." That term is defined by means of examples, which include "caring for oneself, performing manual tasks, walking, seeing, breathing, learning, and working." *Nielsen v. Moroni Feed Co.*, 162 F.3d 604, 610 n. 11 (10th Cir. 1998), *citing* 29 C.F.R. § 1630.2(i).

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In responding to the Defendants' motion, the Plaintiffs identified two major life activities that they contended were applicable here—"working" and "traveling."[10] The Court rejects any assertion that "traveling" itself constitutes a major life activity. Such a task is subsumed within the larger category of "caring for oneself," *Holt v. Grand Lake Mental Health Center, Inc.*, 443 F.3d 762, 767 (10th Cir. 2006) ("Caring for one's self encompasses normal activities of daily living;

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10. Belatedly, the Plaintiffs asserted a third major life activity—"lifting"—they contended applied to Plaintiff Dillon. The Court finds that the Plaintiffs waived this argument by not timely raising it during oral argument. Moreover, the Plaintiffs do not address any argument as to this issue in their brief, further supporting a finding of waiver. In any event, the Court finds that there was insufficient evidence in the record to support such an assertion. An individual is "substantially limited" in a life activity if he is prevented from or severely restricted in his ability to perform the activity when compared to the average member of the general public. *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 197-98 (2002); 29 C.F.R. § 1630.2(j)(1). There was no evidence to indicate that the Defendants subjectively considered Plaintiff Dillon's impairment to severely restrict his ability to lift compared to the average member of the public. *See e.g. Prickett v. Amoco Oil Co.*, 147 F. Supp. 2d 1147, 1153-54 (D. Utah 2001) (citing cases for the proposition that more stringent lifting restrictions than those involved here were not *per se* substantially limiting, and proof of the general public's ability to lift was required). Indeed, at best, the evidence at trial merely established that the Defendants considered his restriction only with regard to his ability to perform the type of lifting required at the mine. This is insufficient to establish a "regarded as" claim based on the life activity of "lifting."

including feeding oneself, driving, grooming, and cleaning home"), and there is no evidence in the record to indicate that the Defendants regarded the Plaintiffs as being substantially limited in their ability to care for themselves.

Thus, the sole focus is on whether the Plaintiffs have come forward with sufficient evidence regarding the major life activity of "working." Claims involving the major life activity of "working" have posed particular challenges for the courts. In *Toyota*, 534 U.S. at 200, the Supreme Court discussed "conceptual difficulties inherent in the argument that working could be a major life activity," and explained that it was "hesitant to hold as much." Nevertheless, the Courtin *Toyota* declined to directly address the question, *id.*, and in the absence of a definitive ruling from the Supreme Court, most courts, including the 10th Circuit, have treated "working" as a major life activity under the ADA. *EEOC v. Heartway Corp.*, 466 F.3d 1156, 1162 n. 5 (10th Cir. 2006). To establish that an employee is substantially impaired in the major life activity of "working," the employee must show that he is significant restricted in the ability to perform either a "class of jobs" or a "broad range of jobs in various classes" as compared to the average person having comparable training, skills, and abilities. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1998), *citing* 29 C.F.R. § 1630.2(j)(3)(i); *Heartway*, 466 F.3 at 1162. It is not enough for an employee to show that an impairment disqualified him from a particular job or a narrow range of jobs. *Sutton*, 527 U.S. at 493, *citing* 29 C.F.R. § 1630.2(j)(3)(i).

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A "class of jobs" is defined as the job from which the employee has been disqualified, and the number and types of jobs utilizing similar knowledge, training, skills, and abilities within that geographical area from which the employee is also disqualified because of his impairment. *Id.*, *citing* 29 C.F.R. § 1630.2(j)(3)(ii)(b). A "broad range of jobs in various classes" is defined as the job from which the employee has been disqualified because of an impairment, and the number and types of other jobs *not* utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the employee is also disqualified because of his impairment. *Id.*, 29 C.F.R. § 1630.2(j)(3)(ii)(c). Thus, an employee claiming that an impairment limits his ability to work in either a "class of jobs" or a "broad range of jobs in various classes" must, at a minimum, come forward with evidence of:(i) the knowledge, training, skills, and abilities involved in the job that the employee held; (ii) the types of jobs available in the local geographic area; and (iii) the training, knowledge, skills, and abilities involved in those other jobs. *See Bolton v. Scrivner, Inc.*, 36 F.3d 939, 944 (10th Cir.1994) ("The evidence does not address Bolton's vocational training, the geographical area to which he has access, or the number and type of jobs demanding similar training from which Bolton would also be disqualified . . . Bolton failed to produce evidence showing a significant restriction in his 'ability to perform either a class of jobs or a broad range of jobs in various classes' ") (citations and footnotes omitted); *MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1445 (10th Cir. 1996) (emphasizing employee's obligation to prove facts about local labor market).

Adding additional analytical complexity is the fact that, in this case, the Plaintiffs do not claim that they *actually* have impairments that substantially limit their major life activities, nor do they claim to have a record of having such impairments. Rather, they proceed only under the "regarded as" prong. 42 U. S .C. § 12102(2)(c).

In a "regarded as" claim, the focus is not on the *objective* effect of the employee's actual or perceived impairment on a major life activity, but instead upon the employer's *subjective* impressions of the consequences of the employee's actual or perceived impairment. *Heartway,* 466 F.3d at 1162-62, *citing Ross v. Campbell Soup Co.,* 237 F.3d 701, 709 (6th Cir. 2001). Thus, for example, to establish Plaintiff Dillon's contention that the Defendants regarded him as being substantially limited in the major life activity of "lifting," he must show that the Defendants subjectively believed that, compared to the average member of the general public, he was severely restricted in his ability to lift things. To show that the Defendants regarded them as being limited in the life activity of "working," the Plaintiffs must show that the Defendants subjectively believed that their impairments disqualified them from a class or range of jobs. *Id.*, 466 F.3d at 1162 (employee must show that employer "subjectively believed the employee to be significantly restricted as to a class of jobs"). As the court in *Ross* explained, proving a "regarded as" case premised upon the major life activity of "working" is "extraordinarily difficult," as "it is safe to assume employers do not regularly consider the panoply of other jobs their employees could perform"

when making decisions about the employee's ability to perform in the employer's workplace. *Id., quoted in Heartway,* 466 F.3d at 1162.

4. *Analysis*

The Court will turn first to the "working" issue. In responding to the Defendants' motion, the Plaintiffs pointed to two pieces of evidence that they contend are sufficient to carry their burden of showing that the Defendants regarded them as being impaired in their ability to perform a class or range of jobs: (i) the "no restrictions" policy itself, and (ii) the comment by Olsen that Plaintiff Clawson might not be able to return to the mining industry.

Viewing the evidence in the light most favorable to the Plaintiffs, the "no restrictions" policy prevented them from returning to their former jobs because they had permanent medical restrictions. Moreover, the record indicates that, at least with regard to Plaintiff Clawson, Langrand believed that Plaintiff Clawson's medical restriction prevented him from being able to perform *any* of the jobs at the mine. However, this alone is insufficient to carry the Plaintiffs' burden. It is not enough to show that the Defendants regarded the Plaintiffs as being unable to perform jobs at the West Elk Mine; the Plaintiffs must also show that the Defendants subjectively believed the Plaintiffs restrictions would restrict their ability to perform jobs utilizing similar training, knowledge, skills, and abilities in the geographical area of Somerset, Colorado.

Heartway, 466 F.3d at 1164. Thus, the question becomes whether the Plaintiffs offered sufficient proof that the Defendants subjectively believed that the Plaintiffs' medical restrictions would disqualify them from a substantial number of jobs in the geographical area of Somerset, Colorado that involved similar skills and knowledge to those performed at the West Elk Mine.

Once the issue is properly framed, the absence of proof necessary to carry the Plaintiffs' burden is obvious. Despite calling a vocational expert, the Plaintiffs put on no evidence of the types of jobs available in and around Somerset, Colorado using the same or similar skills and knowledge as jobs at the West Elk Mine. The Plaintiffs argue in their brief that they offered sufficient evidence of the existence of other heavy equipment operator-type jobs in the local labor market by virtue of their testimony concerning their subsequent employment. This testimony does not rise to a level of sufficient specificity to meet the Plaintiffs' burden. Although the burden of showing the types of jobs found in the local labor market is not intended to be onerous, it is incumbent upon the Plaintiffs to at least show "evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (e.g. 'few,' 'many,' 'most') from which an individual would be excluded because of an impairment." *Heartway*, 466 F.3d at 1164. The mere recitation of the handful of jobs that the Plaintiffs subsequently found provides no picture of the general labor market around Somerset, Colorado, much less indicates whether their medical restrictions would

exclude them from few, many, or most of those local jobs.[11] (Of course, once again, the question is not whether the Plaintiffs' restrictions disqualified them from local jobs, but whether the Defendants subjectively believed that their restrictions would have that result.)

At best, the evidence (other than Mr. Olsen's comment, which the Court will discuss *infra.*) only establishes that the Defendants perceived the Plaintiffs as being incapable of performing the jobs available at the West Elk Mine. Arguably, an employee might be able to prove his employer regarded him as being disqualified form a class of jobs merely by showing that the employer regarded him as being unable to perform all of the jobs offered by the employer. In *Henderson v. Ardco, Inc.*, 247 F.3d 645, 653 (6th Cir. 2001), an employee sustained a back injury and was restricted by her doctor from certain types of bending and lifting. 247 F.3d at 647. She attempted to return to work with those restrictions, but was told by the employer that she must be cleared of all medical restrictions before she could return. *Id.* The Sixth Circuit rejected the same initial argument the Plaintiffs make here—that the "no restrictions" policy was *per se* proof that the employer regarded her as

11. Moreover, the Plaintiffs bear the burden of relating the characteristics of the jobs found in the local labor market to the performance-restricting consequences of the particular impairment they are regarded as having. *Heartway*, 466 F.3d at 1164-65. Even if their testimony about their subsequent employment was sufficient to demonstrate the depth of the local labor market, no effort was made to correlate that testimony with the Plaintiffs' medical restrictions.

limited in her ability to work at a class of jobs. 247 F.3d at 653. Rather, it explained that "[t]he variability of the impairment—relevant job requirements within the business applying the ["no restrictions"] rule is thus important, because it indicates the breadth of the class the employer perceives when the employer applies the rule." *Id.* In other words, *Henderson* stands for the proposition that, when a "no restrictions" policy is imposed by an employer, the Court still must look to the types of jobs that the policy disqualified the employee from, and the court must still examine whether *those* jobs fall within the definition of a "class of jobs." If, for example, the employer had only a set of relatively physically demanding jobs available and its policies prevented an employee from working these jobs, the employer would not necessarily be 'regarding' the plaintiff as disabled, as the lack of variability and type of jobs available goes to the narrowness of the class from which the employer excluded the employer. 247 F.3d at 653 n. 6.

Determining the breadth of the class of jobs available at the West Elk Mine based on the evidence in the record is an awkward proposition. In many instances, specific mining terminology and equipment were referenced without meaningful explanations as to what, how the job of operating them was performed.[12] Nor was

12. There was testimony, for example, that a "ram car" was an all-purpose vehicle used to move coal from the "continuous miner" (another term that was never elaborated upon) to belts that moved the coal out of the mine, and to perform other (Cont'd)

there any evidence purporting to correlate the types of jobs performed by employees at the West Elk Mine, or the skills required for those jobs, with jobs in the coal mining industry generally.[13] *See Heartway,* 466 F.3d at 1167, *citing DePaoli v. Abbott Labs,* 140 F.3d 668, 673 (7th Cir. 1998) ("In order to define a meaningful class of jobs . . . [c]ommon job groupings within an industry would also be relevant.") Without such evidence, the Court is unable to find that the types of jobs the Defendants policy excluded the Plaintiffs from—*i.e.* all jobs at the West Elk Mine—were sufficiently broad as to constitute, of themselves, a "class of jobs" under the ADA.

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functions including watering down mine roads and performing rock dusting. Nevertheless, evidence of the skills and training necessary to operate a ram car, how one is operated, and other details necessary to permit an evaluation of how the task of operating a ram car compares to other types of jobs is not found in the record. An FT3 was described as "a low profile like a front end loader" that is articulated in the middle, and is apparently used to haul supplies into the mine. However, there was no testimony as to whether the skills needed to operate an FT3 were similar to those needed to operate a front end loader, or indeed, what skills one needed to have to operate an FT3.

13. The Court notes that, on at least two occasions, the Plaintiff sought to elicit testimony as to whether the Defendants' pay classifications and requirements of the warehouse job were typical of the mining industry generally, and that the Court sustained defense objections to these questions on the grounds of relevant. At no time, however, did the Plaintiffs argue that the evidence was relevant for purposes of establishing whether the Defendants regarded the Plaintiffs as being limited in their ability to perform a class of jobs.

Undoubtedly, a jury might reasonably infer that the West Elk Mine's jobs fall within a recognized "class of jobs," such as "heavy labor jobs," or, arguably, even "mining jobs," *see Heartway*, 466 F.3d at 1163 n. 6 (citing EEOC regulations that recognize "heavy labor jobs," "manual labor jobs," etc., as "classes of jobs" and acknowledging, without necessarily endorsing, other decisions that recognize "truck driving" as a class of jobs), but this is only sufficient to establish that the Defendants perceived the Plaintiffs as being unable to perform *some* of the jobs within that class. Without proof that the West Elk Mine's jobs are representative of "[m]any—if not most—of" the jobs in a recognizable class, *see e.g. Heartway*, 466 F.3d at 1167 & n. 12, the Plaintiffs have not offered sufficient evidence that the West Elk Mine jobs alone are sufficiently diverse to themselves constitute a "class of jobs."

The only other evidence of the Defendants' subjective beliefs as to the Plaintiffs' limitations on the life activity of "working" is Mr. Olsen's comment to Plaintiff Clawson to the effect that his restrictions might preclude him from working in the mining industry. On the surface, Mr. Olsen's comment might be proof that the Defendants[14] regarded Plaintiff Clawson's impairment as excluding him from a class of jobs in the

14. Although there is disputed evidence as to who ultimately made the decision to terminate Plaintiff Clawson's employment, there is some evidence in the record to indicate that Mr. Olsen was one of the individuals participating in that decision, and thus, his subjective impressions of Plaintiff Clawson's abilities are relevant.

mining industry. On the other hand, it is undisputed that, within the same time frame as making the comment, Mr. Olsen consulted with Plaintiff Clawson's doctor as to whether Plaintiff Clawson could nevertheless perform the warehouse job at the West Elk Mine, and that Mr. Olsen encouraged Plaintiff Clawson to apply for that job. It is difficult to reconcile these two apparently contradictory positions, but fortunately, that is the role of the jury, not the Court. It is sufficient to find that, taking the evidence in the light most favorable to the Plaintiffs, a reasonable jury could find that Mr. Olsen's comment reflected the Defendants' subjective belief that Plaintiff Clawson might be disqualified from most, if not all, jobs in the mining industry. Assuming, as the Court does *supra.*, that "mining jobs" constitute a "class of jobs," Mr. Olsen's comment is sufficient to show that the Defendants regarded Plaintiff Clawson as being significantly impaired in the major life activity of "working," and thus, eligible for protection under the ADA.

However, it is clear from the record that Mr. Olsen's comment was specifically made with reference to Plaintiff Clawson and his impairment, and thus, it offers no support to Plaintiff Dillon's contention that the Defendants regarded Plaintiff Dillon as disabled. Accordingly, the Court finds that Plaintiff Dillon has failed to come forward with sufficient evidence to establish that the Defendants regarded him as being substantially limited in the life activity of "working." The Defendants' Motion for Judgment as a Matter of Law is granted in part, insofar as Plaintiff Dillon failed to

come forward with evidence to establish that the Defendants regarded him as being disabled, and denied in part, insofar as Plaintiff Clawson produced sufficient evidence to show that the Defendants regarded him as disabled.

B. Damages

The remaining motions address various matters relating to damages. For convenience purposes, the Court groups these motions into three categories: (i) those seeking an addition to or reduction from the damages awarded by the jury; (ii) those seeking the application of statutory limits to an award of damages; and (iii) interest. Consistent with its ruling above, the Court will analyze the remaining issues only with respect to Plaintiff Clawson.

1. *Addition to or reduction of jury's award*

Both sides have filed motions in this category. Plaintiff Clawson seeks an award of punitive damages (# 418), and the Court's adoption of the jury's advisory verdict on Plaintiff Clawson's economic losses (# 422). The Defendants request that the Court refuse to adopt the jury's advisory backpay award, citing defects in Plaintiff Clawson's expert's opinions, and requests reduction of any award based on Plaintiff Clawson's receipt of short and long-term disability benefits and unemployment benefits (# 423).

Appendix B

The Court turns first to Plaintiff Clawson's request for the Court to override the jury's determination that, although the predicate facts existed for awarding them, no punitive damage award should be made. Although it harbors significant doubt that Plaintiff Clawson's reliance on *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 (2001), for the proposition that a jury's award of punitive damages is not a finding of fact for purposes of the Seventh Amendment's right to a jury trial necessarily compels the subsequent conclusion that the Court has the authority to impose an amount of punitive damages *greater* than those awarded by the jury, the Court accepts that contention solely for purposes of discussion. Nevertheless, the Court finds no reason to set aside the jury's refusal to award any punitive damages.

Regardless of whether the Court examines whether the jury's award was so excessive (in this case, excessive in its parsimony) that it deprived Plaintiff Clawson of due process under the *Gore* factors, *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-75 (1996), or whether, as Plaintiff Clawson urges, the Court should simply substitute its own judgment for that of the jury and reconsider the issue of punitive damages *de novo*, the result is the same. The evidence was undisputed that the Defendants initially exempted Plaintiff Clawson's light-duty assignment from its policy change eliminating such assignments. The evidence also indicates that the Defendants continued to carry Plaintiff Clawson on the payroll for some period of time after his short-term disability leave was exhausted and

he was otherwise subject to termination under the Defendants' policies. Finally, there was evidence that the Defendants offered to re-hire Plaintiff Clawson in 2003. These facts, among others, could reasonably have lead the jury to conclude that the Defendants' conduct, while unlawful, was not so reprehensible that additional punishment beyond full recompense to Plaintiff Clawson was necessary. As a result, the Court declines to overturn the jury's determination that no punitive damages were appropriate.

Next, the Defendants request that the Court decline to adopt the jury's advisory determination that Plaintiff Clawson suffered $236,000 in economic damages. The jury clearly adopted the conclusion of Plaintiff Clawson's damages expert, Ron Brennan, rather than the testimony of the Defendants' expert, Jerome Darnell. The Defendants argue that Mr. Brennan's assumptions of the pay rate that Plaintiff Clawson would have earned had he been accommodated by reassignment to a vacant position were incorrect; that Mr. Brennan miscalculated the amount of fringe benefits Plaintiff Clawson had earned during his employment with the Defendants; and that Mr. Brennan relied on incorrect wage data from prior years and failed to account for a fire at the mine in projecting future wages. Instead, the Defendants argue that the Court should adopt Mr. Darnell's conclusions.

The Court does not construe the Defendants to be arguing that the jury's verdict is unsupported by the evidence—Mr. Brennan's assumptions, methodology, and calculations were clearly evidence that was

submitted to the jury—nor an argument that Mr. Brennan's opinions should be rejected outright as inadmissible under Fed. R. Evid. 702.[15] Rather, the Court understands the Defendants to argue that the Court should not adopt the jury's advisory verdict simply because the Defendants believe their evidence on the issue of damages was more persuasive. To state the issue is to essentially resolve it. The Court submitted the damages issue to the jury with the specific purpose that the jury would assess the relative credibility of the parties' experts and their methods. The fact that the Court might have reached a different opinion than did the jury is no reason to reject the jury's conclusion; reasonable minds are entitled to differ on such things. Given that the jury's evaluation of the experts' competing opinions was both contemporaneous and considered, as compared to any weighing of such opinions that this Court would do in hindsight and on a cold record several months after the fact, the Court is inclined to defer to the jury's decision. Accordingly, the

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15. The Defendants previously moved to exclude Mr. Brennan's testimony under Fed.R.Evid. 702 (# 288). The Court conducted three days of evidentiary hearings (# 312, 374, 377) concerning Brennan's qualifications and methods, at which the Defendants raised a number of objections to both matters. On October 31, 2005, the Court issued an oral ruling (# 378), deeming some of Mr. Brennan's opinions admissible over Fed.R.Evid. 702 objections, and others inadmissible. The Court assumes that only opinions previously deemed as admissible were presented at trial.

Court adopts the jury's advisory verdict that Plaintiff Clawson suffered $236,000[16] in economic damages.

The Defendants also argue that Plaintiff Clawson's economic damages should be reduced by the value of his short- and long-term disability benefits, and any amount of unemployment compensation he received. The 10th Circuit has never spoken dispositively on what social welfare benefit payments should be offset against an award of backpay in an employment discrimination case, but its decisions clearly indicate that several factors warrant consideration: whether the benefit is funded fully by the employer, or whether the employee contributes; whether granting or denying an offset would result in a windfall to either party; whether the benefit would have been available to the employee if he had continued working; and whether other public interests were involved. *E.E.O.C. v. Sandia Corp.*, 639 F.2d 600, 625-26 (10th Cir. 1980); *E.E.O.C. v. Wyoming Retirement System*, 771 F.2d 1425, 1431-32 (10th Cir. 1985).

Turning first to Plaintiff Clawson's receipt of $11,180 short-term disability benefits from May to November

16. The jury's award exceeded Brennan's calculations by approximately $500. The Plaintiff contends that the jury may simply have rounded up, or may have elected to award the Plaintiff additional damages for unitemized expenses relating to his job searches. The Defendants do not specifically object to the jury's decision to slightly exceed Brennan's calculation, and thus, the Court will accept the full amount of the jury's award.

1999, it is apparently undisputed that benefits were fully self-funded by the Defendants, with no contribution by Plaintiff Clawson. There is no dispute that that the benefits are provided voluntarily by the Defendants; that is, that there is no public policy that requires the Defendants to make such benefits available. It is also clear that the benefits are only made available to an employee who is otherwise unable to work, and thus operate as a substitute for wages. As such, it would amount to a windfall for Plaintiff Clawson if he were to recover backpay for the period from May to November 1999 (a period Mr. Brennan's damages calculations included), while simultaneously retaining disability benefits he received as a substitute for those wages during that period. Thus, the Court finds that it would be appropriate to deduct the short-term disability benefits received by Plaintiff Clawson from his economic damage award.

The Defendants also seek an offset of $5,809 in long-term disability benefits received by Plaintiff Clawson from November 1999 through September 2000. It is undisputed that such benefits were paid by an insurer on behalf of the Defendants, and that the premiums for such insurance were paid by the Defendants, without any contribution from the Plaintiff. As with short-term benefits, it is undisputed that the long-term disability benefits are intended to operate as a replacement for wages the employee otherwise does not receive, and that the benefit is not compelled by law to be provided. Failing to deduct this amount from the backpay award would result in a windfall to Plaintiff Clawson, as it would allow

him to effectively recover double wages for the period of November 1999 through September 2000.[17] Plaintiff Clawson argues that long-term disability insurance was a part of his negotiated compensation package, and that offsetting his benefits would have the effect of negating some of his agreed-upon compensation. However, an offset does not negate his bargained-for benefits; it gives them full effect. *See e.g. Giles v. General Elec. Co.*, 245 F.3d 474, 495 (5th Cir. 2001). He has received the benefits he was entitled to when he became unable to work, and compensating him a second time with wages for that same period of time would be duplicative. Thus, the Court finds that the Defendants are entitled to an offset of the long-term benefits received by Plaintiff Clawson as well.

The same cannot be said of the $15,409 received by Plaintiff Clawson as unemployment compensation. Unemployment compensation, unlike voluntary insurance provided by the employer, is compelled by law to be provided and exists to further social interests beyond those negotiated between employer and employee. Although an employer makes all payments necessary to provide for such benefits, such mandated benefits inflexibly replace employees' ability to bargain for higher wages in lieu of less protection against

17. Arguably, allowing an offset might offer some small windfall to the Defendants, insofar as the premiums payable to obtain insurance should reflect some discount against the benefits payable under the policy, but the record does not offer any basis upon which such a windfall (to the extent it exists) could be determined.

unemployment, and thus, it would be inaccurate to suggest that the burden of funding unemployment benefits falls entirely on the employer. Most importantly, cases such as *Sandia* and *Cooper v.. Cobe Laboratories, Inc.*, 743 F. Supp. 1422, 1435 (D. Colo. 1990), make it clear that the more well-accepted trend in this Circuit is to decline to offset a damage award with unemployment benefits. Accordingly, the Court declines to reduce Plaintiff Clawson's economic damages by the value of unemployment benefits he received.

Based on the foregoing, Plaintiff Clawson's economic damages award of $236,000 is reduced by $11,180 in short-term disability benefits and $5,809 in long-term disability benefits, and the Court awards him $219,011 in total economic damages.

2. *Statutory caps*

The jury awarded Plaintiff Clawson $250,000 in non-economic damages. Although the ADA allows the award of these compensatory damages, such awards are subject to statutory caps based on the size of the employer. 42 U.S.C. § 1981a(b)(3). As relevant here, the statute caps non-economic damage awards at $200,000 for employer with 500 or fewer employees and $300,000 for employers with more than 500 employees in the 20 weeks prior to the alleged discrimination. *Id.* The Defendants concede that they bear the burden of establishing the number of employees they employed.

Appendix B

The jury found that all three corporate Defendants operated as a single employer. The parties' dispute turns primarily on whether, during the period at issue, the three entities cumulatively employed more or less than 500 employees. That dispute, in turn, revolves around whether Defendant Arch Coal had approximately 164 employees during the relevant time period, as the Defendants contend by affidavits, or whether it had in excess of 230 employees, as an EEO-1 report submitted by Defendant Arch Coal in December 2000 indicates. Plaintiff Clawson argues that the Court should not consider the Defendants' affidavit, as the Defendants never disclosed the affiants as a witnesses and that the affidavits are inadmissible summaries under Fed. R. Evid. 803. The Defendants argue that the Court should not consider the EEO-1 forms, based on a conclusory and somewhat cryptic assertion that the forms are unreliable because "The company is required to file EEO-1's on a location-by-location basis, and employees of more than one company may work at a single location."

The Court simply cannot resolve this factual dispute on the skeletal record presented. Accordingly, an evidentiary hearing is necessary to determine the number of employees at each of the Defendant entities during the relevant time period. A 90-minute evidentiary hearing is set for **Tuesday, March 27, 2007** at **1:30 p.m.** in the Arraj Courthouse in Denver. Each side will be permitted a total of 45 minutes for presentation of their witnesses, cross-examination of their opponent's witnesses, evidentiary objections, and

argument. Counsel shall confer in advance of the hearing and attempt to enter into such stipulations as may be appropriate to streamline the admission of evidence and calling of witnesses.[18]

3. *Interest*

The Defendants essentially concede that an award of pre-judgment interest on the economic damage award is appropriate. Based on the foregoing, Plaintiff Clawson is entitled to an award of economic damages of

18. To dispose of collateral issues raised in the parties' briefing of this issue, the Court denies any request to strike witnesses or permit additional discovery. The parties had ample opportunity to anticipate factual disputes over this issue prior to trial and to conduct appropriate discovery at that time. The Court also declines to consider the number of employees at any entity other than the named Defendant corporations. Plaintiff Clawson had the opportunity to request a jury determination as to the single employer issue, and elected to focus only on the named Defendant corporations. To the extent that Plaintiff Clawson believed that other corporate entities or non-party subsidiaries should also be considered for purposes of the statutory caps, a predicate showing that those entities operated as a single employer for purposes of Plaintiff Clawson was required. *See e.g. Parrish v. Solecito*, 280 F. Supp. 2d 145, 156 (S.D.N.Y. 2003) (declining to count employees of parent corporation's other subsidiaries absent proof that they collectively operated as single employer). Plaintiff Clawson had a full and fair opportunity to present any single employer claims to the jury, and by electing to proceed only as against the named Defendants, is deemed to have waived any claim that any other corporate entity should be considered for purposes of determining the appropriate statutory cap.

$219,011. Plaintiff Clawson seeks prejudgment interest on this sum at the Colorado statutory rate of 8%, C.R.S. § 5-12-101, calculated according to the formula in *Reed v. Minetta*, 438 F.3d 1063, 1067 n. 4 (10th Cir. 2006). The Defendants propose a prejudgment interest rate of 4.9%, the average rate of 1-year constant maturity Treasury securities as of April21, 2006, as provided for by 28 U.S.C. § 1961(a), and compounded annually.

The burden of establishing the appropriate interest rate is on Plaintiff Clawson. *See e.g. Barbour v. Merrill*, 48 F.3d 1270, 1279-80 (D.C. Cir. 1995) (plaintiff seeking front pay award bears burden of proving applicable discount rate). Determining the appropriate prejudgment interest rate and compounding formula falls within the Court's discretion, to be exercised with an toward ensuring complete compensation to Plaintiff Clawson. *Reed*, 438 F.3d at 1066. Thus, eye the appropriate rate of prejudgment interest is that which Plaintiff Clawson could have reasonably expected to receive had he invested the funds reflected in his economic damage award from early 2000, the date of his termination, to April 2006, the date of trial.

Plaintiff Clawson presented no evidence at trial and offers none as to what rate of return he would have obtained on an investment over the pertinent time period. Instead, Plaintiff Clawson argues that the Colorado statutory post-judgment interest rate, 8%, should apply. The Defendants contend that a rate of 4.9%, based upon the April 2006 treasury security rate, is appropriate.

Appendix B

Determining an accurate rate of historical returns is a factual issue, for which Plaintiff Clawson bears the burden of proof.His reference to Colorado's fixed statutory post-judgment interest rate does not satisfy this burden, particularly as that statute artificially sets an interest rate for purposes of convenience, not in an effort to accurately reflect historical rates of return. The Defendants concede that 4.9% is an appropriate prejudgment interest rate, and in the absence of evidence to the contrary, the Court adopts a prejudgment interest rate of 4.9%.[19]

Plaintiff Clawson argues that interest should accrue on each bi-weekly payment as of the date it was due, and should accrue according to the formula in *Reed*. The Defendants argue that such a calculation is needlessly complicated and, arithmetically, little different from merely compounding interest annually. Lacking easy access to the raw data, the Court would normally be

19. Interestingly, the rate of 4.9% would appear to exceed actual returns on investments during the requisite time period. For example, between February 1, 2000 and May 1, 2006, the Dow Jones Industrial Average rose from 11,041 to 11,343, an average overall rate of return of 2.7%. Over that same period, the NASDAQ index fell from 4,051 to 2,304, an average return of -43%. For more conservative investments, federal data, reported on an annualized basis, showing the yields of one-year, constant maturity treasury securities rates reveals that, for the period of 2000 to 2006, the average annual yield was 3.33%, and similar federal data showing average rates for 6-month certificates of deposit during the same period shows an average annual rate of return of 3.4%. *See* www.federalreserve.gov/RELEASES/h15/data.htm.

inclined, solely for purposes of expediency, to agree with the Defendants. However, if the data were readily available, as it appears to be from Plaintiff Clawson's submissions, it is preferable to apply the more realistic method described in *Reed*.

The Court declines to calculate the actual amount of prejudgment interest due on the economic damage award in this Order, leaving it to the parties to confer and calculate for themselves the amount of prejudgment interest, applying the methodology in *Reed* and utilizing an annual interest rate of 4.9%. If the parties are able to agree upon an amount of interest by the time of the March 27, 2007 hearing, the Court will hear argument on the parties' respective calculations and resolve the issue at that hearing.

Plaintiff Clawson also requests prejudgment interest on the non-economic damage award. He acknowledges that there is no authority in this or any other Circuit specifically authorizing such an award. The Court finds that the notion of prejudgment interest to be incompatible with the concept of non-economic damages, which are designed to make Plaintiff Clawson whole for his emotional distress, embarrassment, etc. Unlike a hard asset, such as wages that would have been received but for discrimination, one cannot invest one's unhurt feelings in the stock market in order to earn a return. An award of prejudgment interest on compensatory damages would imply the preposterous notion that one's suffering could, at the time, have been used as an investment vehicle. Absent persuasive

authority specifically recognizing the appropriateness of such an award, the Court declines to award prejudgment interest on non-economic compensatory damages.

CONCLUSION

For the foregoing reasons, the Defendants' oral motion for judgment as a matter of law is **GRANTED IN PART,** insofar as the Defendants are entitled to judgment as a matter of law on the claims asserted by Plaintiff Dillon, and **DENIED IN PART,** insofar as Plaintiff Clawson introduced sufficient evidence at trial to support his claim.[20] The Plaintiffs' unopposed Motion to Speak to Former Jurors **(# 415)** is **GRANTED.** The Plaintiffs' Motion to Clarify and Conditional Motion for Briefing and Briefing Schedule **(# 416)** is **DENIED** as moot. The Plaintiffs' Motion for Assessment and Award of Punitive Damages or for Additur **(# 418)** is **DENIED.** The Plaintiffs' Motion for Entry of Judgment **(# 419)** is **DENIED** as premature, as there remain matters to be resolved before judgment can enter. Plaintiff Jared Dillon's Motion for Award of Front Pay **(# 421)** is **DENIED** as moot. The Plaintiffs' Motion for Back Pay

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20. The Court finds that, pursuant to Fed.R.Civ.P. 54(b), it is inappropriate to enter judgment against Plaintiff Dillon at this time, as any appeal by Plaintiff Dillon of this Court's Rule 50 ruling might present some of the same issues as any cross-appeal Plaintiff Clawson might file in response to an appeal by the Defendants of the judgment in his favor. Accordingly, the Court will defer entry of judgment against Plaintiff Dillon until such time as judgment enters in favor of Plaintiff Clawson.

and Interest (# 422) and the Defendants' Motion for Application of Statutory Damage Cap and for Reduction of Advisory Back Pay Awards (# 423) are **GRANTED IN PART,** insofar as the Court finds that Plaintiff Clawson is entitled to an award of backpay in the amount of $219,011, plus prejudgment interest at an annual rate of 4.9%, compounded as set forth in this Order, and the Court **RESERVES RULING** on the issue of the application of the statutory cap, pending an evidentiary hearing, and **DENIED IN PART,** in all other respects. The Court will conduct an evidentiary hearing at **1:30 p.m.** on **Tuesday, March 27, 2007,** at the Arraj Federal Courthouse in Denver, for the purpose of addressing the reserved issue of application of the statutory cap. The Plaintiffs' Motions to Amend their motions (# 425, 426, 428) are **DENIED** as moot, and as the Plaintiffs' Motion to Amend motion (# 429) is **GRANTED,** insofar as the Court will deem the original motion (# 422) to be supplemented by the revised interest calculations.

BY THE COURT:

s/ Marcia S. Krieger
Marcia S. Krieger
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING PETITION FOR REHEARING FILED JULY 28, 2009

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 08-1004

JARED L. DILLON,

Plaintiff - Appellant,

v.

MOUNTAIN COAL COMPANY, L.L.C.;
ARCH WESTERN RESOURCES, L.L.C.,
a Delaware Corporation; ARCH COAL, INC.,
a Delaware Corporation,

Defendants - Appellees.

ORDER

Before **TACHA, SEYMOUR,** and **HOLMES,** Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in

regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court,

s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk

APPENDIX D — STATUTES INVOLVED

42 U.S.C.S. § 12102

§ 12102. Definitions

As used in this Act:

(1) Auxiliary aids and services. The term "auxiliary aids and services" includes—

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability. The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State. The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

42 U.S.C.S. § 12112

§ 12112. Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a), the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee

because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries.

(1) In general. It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation.

(A) Presumption. If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

(B) Exception. This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

(C) Determination. For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

Appendix D

(d) Medical examinations and inquiries.

(1) In general. The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) Preemployment.

(A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination. A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this Act shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this title.

Appendix D

(4) Examination and inquiry.

(A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement. Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

U.S.
FILED

No. 09-510

In The
Supreme Court of the United States

JARED L. DILLON,

Petitioner,

v.

MOUNTAIN COAL COMPANY, L.L.C.; ARCH WESTERN RESOURCES, L.L.C.; and ARCH COAL, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Tenth Circuit's decision that Petitioner failed to present sufficient evidence to show that he was regarded as disabled in the major life activity of working under the prior version of the Americans with Disabilities Act was correct, given that the court's opinion on the issues stated by Petitioner does not conflict with a decision of this Court or another court of appeals.

PARTIES TO THE PROCEEDING

This case was originally brought by four plaintiffs: John R. Bartlett, Michael E. Clawson, Jared L. Dillon, and Thomas E. Richards. The district court dismissed the claims of Bartlett and Richards, and they did not appeal. Clawson later settled his claims and did not participate in the appeal. Petitioner Dillon was the sole appellant in the Tenth Circuit. Mountain Coal Company, L.L.C., Arch Western Resources, L.L.C., and Arch Coal, Inc. were the defendants in the district court and the appellees in the Tenth Circuit.

RULE 29.6 DISCLOSURE STATEMENT

Mountain Coal Company, L.L.C. is wholly-owned by Arch Western Bituminous Group, L.L.C., which is wholly-owned by Arch Western Resources, L.L.C. That entity, in turn, is 99% owned by Arch Western Acquisition Corporation, which is wholly owned by Arch Coal, Inc.

Arch Coal, Inc. is a publicly-traded corporation. No publicly-held companies own 10% or more of its stock.

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves the definition of "disability" under the prior version of the Americans with Disabilities Act (the "ADA" or "Act"), 42 U.S.C. § 12101 *et seq.* (1990), which was in effect before its amendment by the ADA Amendments Act of 2008 (the "ADAAA"). The pertinent provisions of the ADA are reproduced in the Appendix to the Petition. The pertinent regulations, 29 C.F.R. §§ 1630.2(j) and (l) (1991), are reproduced in the Appendix to this Opposition at 1a.

INTRODUCTION

Petitioner has presented no compelling reasons for the Court to grant his Petition for a Writ of Certiorari. Petitioner submits four questions for review. Yet none of those questions presents a conflict between the Tenth Circuit's decision and prior decisions of this Court or another circuit court; and none presents a matter of important legal consequence, particularly because the issues raised by Petitioner do not apply to future claims following the 2008 amendments to the ADA.

This case does not present any novel issues of federal law. Petitioner claims that he was regarded as disabled in the major life activity of working and was discriminatorily discharged from his position as an underground coal miner. The Tenth Circuit applied the well-settled standards pertaining to such claims

under the ADA – standards that have been set forth in regulations of the Equal Employment Opportunity Commission ("EEOC"), expounded upon by this Court, and applied consistently by the circuit courts – in concluding that Petitioner failed to present sufficient evidence to establish that he was regarded as substantially limited in the performance of a class of jobs or a broad range of jobs.

Petitioner argues that there are various circuit splits on the application of these standards, including (a) the use of pretext evidence to show that an individual is regarded as disabled, (b) the need for evidence of the job market in the relevant geographic area, (c) the ability to satisfy the burden of proof with evidence of the jobs available within a single facility, and (d) the impact of a no-restrictions policy on the regarded-as-disabled analysis.

In fact, the circuits have not divided on these issues. The circuit courts have agreed on the applicable legal standards for regarded-as-disabled claims, but have simply applied those standards differently based on the particular facts of each case – which is entirely appropriate given the highly individualized nature of disability claims.

Nor do these matters have continuing relevance. All the issues raised by Petitioner are moot following Congress's passage of the ADAAA in 2008. Under the prior language of the ADA, plaintiffs like Petitioner had to prove they were regarded as substantially

limited in a major life activity. Now, regarded-as-disabled plaintiffs only need to show that they are regarded as having an impairment, regardless of whether that impairment is perceived to limit a major life activity. Accordingly, any ruling on the issues raised in the Petition would not apply to future ADA cases and would result in an inefficient and unwise exercise of the Court's certiorari jurisdiction.

For all these reasons, the Petition should be denied.

STATEMENT OF THE CASE

1. *Factual Background.* In 1997, Petitioner Jared L. Dillon began working as an Underground Maintenance Mechanic at the West Elk Coal Mine operated by Mountain Coal Company, L.L.C. ("Mountain Coal") near Somerset, Colorado. Court of Appeals Appendix ("C.A. App.") 2282, 2879, 3562, 3566, 3658. The position involved various physically demanding tasks, including repairing mechanical mining equipment and hydraulic, electrical, and conveyor systems. *Id.* at 2282, 2285.

Petitioner sustained neck and back injuries in 1999 and worked at Mountain Coal only a short time thereafter, mostly on light duty assignments. *Id.* at 3426-27, 3515-16, 3576, 3615-17. Petitioner's doctor eventually placed him at maximum medical improvement ("MMI"), gave him a permanent partial impairment rating, and ordered lifting restrictions of no

more than fifty pounds maximum and twenty-five pounds occasionally. *Id.* at 2342, 2346, 3427.

After Petitioner exhausted his short-term disability benefits, reached MMI, and received his permanent lifting restrictions, Mountain Coal determined that he could not perform the duties of his position consistent with his restrictions and that there were no other vacant positions at the mine that he was qualified to perform. *Id.* at 2354, 3425, 4068. Accordingly, Mountain Coal terminated his employment in January 2000. *Id.* at 2354, 3425.

Petitioner and three other plaintiffs filed ADA claims against Mountain Coal and two of its parent companies, Arch Western Resources, L.L.C. and Arch Coal, Inc. *Id.* at 231-82. The district court dismissed two of the plaintiffs' claims on summary judgment. *Id.* at 35-36. Petitioner and the other remaining plaintiff proceeded to trial, at which a jury found in their favor on claims alleging that they were regarded as disabled under the ADA, denied reasonable accommodations, and (as to Petitioner) terminated because of a disability. *Id.* at 986-93. The jury also found that the three Respondents acted as an integrated enterprise and, thus, were jointly liable. *Id.* at 986-87.

The district court granted Respondents' motion for judgment as a matter of law under Fed. R. Civ. P. 50 with regard to Petitioner, but denied the motion as

to his co-plaintiff.[1] Pet. App. 18a-58a. Petitioner appealed. C.A. App. 1667-69. A panel of the Tenth Circuit affirmed the decision. Pet. App. 1a-17a. The Tenth Circuit also denied Petitioner's request for rehearing by the panel or *en banc*. *Id.* at 59a-60a.

2. *Response to Petitioner's Factual Assertions.* As Petitioner points out, the parties disputed at trial the number of job titles or positions utilized at the West Elk Mine and the lifting restrictions applicable to each of them. The evidence shows only that the above-ground Warehouse Technician position could be performed within Petitioner's restrictions. C.A. App. 2290-93, 3421. While Petitioner refers to other "jobs," such as "lube man" and "fuel hauler," Pet. at 2-5, Mountain Coal treated these as assignments within the positions of Underground Production/Utility Miner and Underground Maintenance Mechanic. C.A. App. 3974-75, 4056-58. Mountain Coal recognized only those two underground positions, with different primary assignments within them, due to the need for flexibility in the remote and potentially dangerous underground mining environment, where employees must be able to perform the variety of tasks needed at any particular time. *Id.* at 3975-80. Petitioner elicited very little evidence at trial about the nature of these

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[1] The parties disputed whether the district court granted the motion under Rule 50(a) or 50(b). However, as the Tenth Circuit noted in its decision, that issue "does not affect [the] analysis." Pet. App. 4a.

individual assignments or any other positions within Mountain Coal.

The parties also disputed the extent to which the so-called no-restrictions policy was enforced, with Mountain Coal presenting evidence that it applied other policies requiring the accommodation of disabilities, reviewed individual restrictions, and allowed some employees to work with medical restrictions if they could perform the essential functions of their jobs with or without reasonable accommodations. *Id.* at 2305, 2307, 2318-19, 2335-36, 2416, 2873, 3446-49, 3465-67, 3470-71, 3588-89, 4151-52.

Additionally, the parties disputed certain events leading up to Petitioner's termination, as well as the application of Mountain Coal's policies to Petitioner. Even taking all the evidence in the light most favorable to Petitioner (as the Tenth Circuit did), at most, he showed that: (a) when he complained to his supervisor about being in "severe pain" whenever he tried to work, his supervisor suggested that "if it was my position, I would go home and not come back until someone had got you fixed correctly because there is something obviously wrong," and he took that advice and went home; (b) he called the Human Resources Manager about his return to work and was purportedly told that he could not come back unless he had no restrictions, although he had previously been allowed to work with restrictions; and (c) the Human Resources Manager, who recommended his termination, testified that the lifting restrictions imposed on him "aren't even close to what our physical demands

analysis require" and that there were no other vacant jobs at the mine that he was qualified to perform. *Id.* at 3587, 4071-72, 4282-83.

Petitioner urges that Mountain Coal "refused to engage in the interactive process with him. . . ." Pet. at 2. In fact, the undisputed evidence shows that Mountain Coal determined that Petitioner was not a qualified individual with a disability and thus that the ADA's accommodation provisions did not apply. C.A. App. 1524.

Petitioner is correct that he did not present any expert testimony on the job market within the relevant geographic area. Pet. at 5. Petitioner never actually delineated the relevant geographic area, but only indicated that he had previously worked in jobs in the towns of Delta, Grand Junction, Gunnison, Hotchkiss, Kremmling, Lazear, Montrose, Paonia, and Somerset, Colorado. C.A. App. 3654-56. He showed that there were two other coal mines in the area, but did not present any evidence concerning what jobs may have been available at those mines. *Id.* at 3341, 3655. He also showed that he had prior experience in ranching, farming, maintenance, and mechanical work, but did not present any evidence about what jobs may have been available in those fields in the relevant geographic area. *Id.* at 3560, 3654. His co-plaintiff, who had a similar work background and was terminated around the same time, was able to find work at another mine, a sawmill, and some construction companies. *Id.* at 2432, 3391-92, 3514.

3. *The District Court's Decision.* After the trial, Judge Krieger of the United States District Court for the District of Colorado granted Respondents' motion for judgment as a matter of law under Fed. R. Civ. P. 50, concluding that Petitioner failed to present sufficient evidence to show that he was regarded as disabled in the major life activity of working. Pet. App. 37a-44a, 57a.

The district court held that the salient question was whether Respondents subjectively believed that Petitioner's lifting restrictions prevented him from working in a class or a broad range of jobs. *Id.* at 34a-38a. The court noted that Petitioner "put on no evidence of the types of jobs available in and around Somerset, Colorado using the same or similar skills and knowledge as jobs at the West Elk Mine." *Id.* at 38a. The court added, "The mere recitation of the handful of jobs that the Plaintiffs subsequently found provides no picture of the general labor market around Somerset, Colorado, much less indicates whether their medical restrictions would exclude them from few, many, or most of those local jobs." *Id.* at 38a-39a.

Thus, the court held that, at most, Petitioner and his co-plaintiff showed that Mountain Coal had a blanket no-restrictions policy and regarded them as being unable to perform any jobs at its mine. *Id.* at 32a, 39a. Nonetheless, Petitioner's claims still failed because he did not provide "sufficient evidence that

the West Elk Mine jobs alone are sufficiently diverse to themselves constitute a 'class of jobs.'" *Id.* at 42a.[2]

4. *The Court of Appeals' Decision.* The Tenth Circuit affirmed the district court's decision. The court noted that the parties disputed various factual issues, including whether the mine applied a no-restrictions policy, but found that Petitioner presented sufficient evidence to show that Mountain Coal regarded him as substantially limited in the ability to perform his former position and had a no-restrictions policy preventing employees with medical restrictions from working at the mine. *Id.* at 9a.

However, the court held that under the ADA, the EEOC's regulations, and prior opinions on the issue, Petitioner failed to present sufficient evidence to show that Mountain Coal regarded him as substantially limited in his ability to perform a class or broad range of jobs. *Id.* at 5a-13a. With respect to a class of jobs, the court held that the no-restrictions policy was not itself sufficient to prove that Mountain Coal regarded Petitioner as substantially limited in his ability to work in any jobs outside the mine and

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[2] The claim of Petitioner's co-plaintiff succeeded only because he testified that one of the managers involved in the decision to terminate his employment commented that his restrictions might preclude him from working in the mining industry – which might qualify as a class of jobs. C.A. App. 42a-44a. However, as the district court and Tenth Circuit both found, this comment was not directed at and did not pertain to Petitioner. *Id.* at 12a, 43a-44a.

that "[Petitioner] did not put on other evidence describing the jobs available in the area that fell into the class of 'mining jobs,' nor did he produce evidence demonstrating that mining jobs are, in fact, a class of jobs." *Id.* at 10a. Likewise, the court held, the policy did not itself support a finding that Mountain Coal regarded Petitioner as unable to perform a broad range of jobs outside the mine, and "[Petitioner] did not produce evidence describing the jobs available in the area." *Id.*

As to the West Elk Mine itself, the court held that "there was no evidence . . . that the jobs within the mine could properly be described as a 'class of jobs' or a 'broad range of jobs.'" *Id.* at 11a. Citing the applicable regulation, 29 C.F.R. § 1630.2(j)(3)(ii)(C), the court explained that Petitioner "show[ed] only that West Elk Mine had a variety of mining jobs," but not that "those jobs fell into different classes, or that the jobs would require different skills and training from [Petitioner's] job at the mine." Pet. App. 11a.

Finally, based on an absence of evidence, the court dismissed Petitioner's argument that pretext evidence concerning the reasons for his termination could assist him in showing that Mountain Coal regarded him as disabled. *Id.* at 13a. Noting that "Mountain Coal . . . has not claimed that the lifting restrictions played no role in [Petitioner's] firing . . . [and] has not given any alternative reason for firing [Petitioner]," the court held that "Mountain Coal

cannot be said to have created a pretextual reason for firing [Petitioner]." *Id.*

REASONS FOR DENYING THE PETITION

Each of the four questions presented for review involves application of the legal standards for claims that an individual is regarded as disabled in the major life activity of working under the ADA. These standards are well developed and consistently applied by the federal circuit courts. The standards also have been substantially modified by the recent amendments to the ADA. Because Petitioner does not raise any circuit splits or any issues of federal law that remain relevant under the amended ADA, the Petition should be denied.

In order to come within the anti-discrimination and accommodation provisions of the ADA, a plaintiff must first establish that he is a "qualified individual with a disability" under the Act. 42 U.S.C. § 12112(a), (b) (1990); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 477 (1999), *overruled by statute*, ADAAA, Pub. L. No. 110-325, 122 Stat. 3553. At the time in question, the ADA defined a "disability" as:

> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> (B) a record of such an impairment; or

> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2) (1990).

As to the third definition, which is at issue in this case, under the previous language of the ADA, an individual was regarded as having a disabling impairment when an employer mistakenly believed either that he "ha[d] a physical impairment that substantially limit[ed] one or more major life activities" or that his "actual, nonlimiting impairment substantially limit[ed] one or more major life activities." *Sutton*, 527 U.S. at 489. *See also* 29 C.F.R. § 1630.2(l) (1991); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521-22 (1999). In either instance, the individual had to prove he was regarded as substantially limited in at least one major life activity. *See Sutton*, 527 U.S. at 489-91.

When the major life activity was that of working, as in this case, "the statutory phrase 'substantially limits' require[d], at a minimum, that plaintiffs allege they [were] unable to work in a broad class of jobs." *Id.* at 491.[3] Thus, "one must be precluded from more

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[3] Respondents contend that "working" was not a recognized major life activity under the prior version of the ADA. This Court has never determined that working is a major life activity and has expressed some reluctance to do so. *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 200 (2002), *overruled by statute*, ADAAA, Pub. L. No. 110-325, 122 Stat. 3553; *Sutton*, 527 U.S. at 492. Nonetheless, this issue is moot under the

(Continued on following page)

than one type of job, a specialized job, or a particular job of choice." *Id.* at 492. *Accord Murphy*, 527 U.S. at 523 ("[T]o be regarded as substantially disabled in the major life activity of working, one must be regarded as precluded from more than a particular job."); 29 C.F.R. § 1630.2(j)(3)(i) (1991) ("The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.").

The EEOC regulations issued under the previous version of the ADA, which have been cited by this Court and applied consistently by the circuit courts, provide that, with respect to the major life activity of working, "[t]he term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i) (1991), *cited in Murphy*, 527 U.S. at 523, and *Sutton*, 527 U.S. at 491. The regulations further provide a list of factors to consider in determining whether an employee is substantially limited in the major life activity of working, including (a) "[t]he geographical area to which the individual has reasonable access," (b) the job from which the individual was disqualified due to an impairment and "the number and types of jobs utilizing similar

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newly-modified language of the ADA, which defines major life activities to include working. 42 U.S.C. § 12102(2)(A) (2008).

training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs)," and (c) the job from which the individual was disqualified due to an impairment and "the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes)." 29 C.F.R. § 1630.2(j)(3)(ii) (1991).

All of these issues are no longer germane for claims arising after January 1, 2009, the date on which the ADAAA went into effect. The circuit courts have uniformly held that the ADAAA does not apply retroactively. *See, e.g., Lytes v. D.C. Water & Sewer Auth.*, 572 F.3d 936, 939-42 (D.C. Cir. 2009); *Milholland v. Sumner County Bd. of Educ.*, 569 F.3d 562, 565-67 (6th Cir. 2009). *See also Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (unless Congress clearly expresses a contrary intent, statutes that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed" apply only prospectively). Accordingly, as even Petitioner concedes, the ADAAA does not affect the legal standards applicable to Petitioner's claims.

Under the modified provisions of the ADA, an individual can satisfy the requirement of being regarded as disabled simply by "establish[ing] that he or she has been subjected to an action prohibited

under this chapter because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*." 42 U.S.C. § 12102(3)(A) (2008) (emphasis added). Thus, in regarded-as-disabled claims, it is no longer necessary for plaintiffs to prove (as Petitioner was required to prove) that they were regarded as substantially limited in a major life activity. As a result, the issues raised by Petitioner are now moot.

I. Petitioner has shown no compelling reason for this Court to consider whether a plaintiff may use pretext evidence to prove that he is regarded as disabled.

Petitioner contends that this case presents a split of authority among the circuit courts concerning whether pretext evidence may be evidence that an employee is regarded as disabled under the first step of the *McDonnell Douglas* framework. Pet. at 9-17. There is no circuit split on this issue, since the cases can be harmonized based on their factual differences. Moreover, this case does not even address the issue of pretext, or the *McDonnell Douglas* framework more generally, because the parties did not dispute the reason for Petitioner's termination and Petitioner did not present any pretext evidence. Finally, the issue does not concern an important question of federal law warranting Supreme Court review, since it is moot (or, at the very least, substantially modified) under the current language of the ADA.

In prior decisions setting forth the *McDonnell Douglas* burden-shifting framework for proving discriminatory treatment through circumstantial evidence, this Court has held that a plaintiff must initially make out a *prima facie* case of discrimination, after which the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the challenged employment action. Under the final step of the analysis, the plaintiff bears the burden of persuasion to show that the employer's stated reason is a pretext for discrimination. *See, e.g.*, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-12 (1993); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-56 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973).

"Pretext," as used in the *McDonnell Douglas* analysis, does not refer to ordinary factual disputes or allegations of falsehood, as Petitioner suggests. Pet. at 14-15. Rather, "'pretext' means 'pretext for discrimination.'" *St. Mary's Honor Ctr.*, 509 U.S. at 516. *Accord McDonnell Douglas*, 411 U.S. at 805 (pretext means "a coverup for a . . . discriminatory decision").

In recent years, some circuit courts have extended the use of *McDonnell Douglas* pretext evidence in regarded-as-disabled cases, such that evidence that an employer gave false reasons for its challenged actions could assist a plaintiff in proving that he was regarded as disabled, when it was paired with other strong evidence suggesting that the

employer believed the plaintiff could not perform a class or broad range of jobs. *See, e.g., Moorer v. Baptist Mem'l Health Care Sys.*, 398 F.3d 469, 473-77, 480-84 (6th Cir. 2005) (plaintiff's employer told him his alleged performance problems were caused by alcoholism, told his wife he was an alcoholic and "will never be cured," forced him to take a fitness-for-duty examination, provided false performance-based reasons for his termination, and believed he could not perform any of his diverse job duties as a manager); *Ross v. Campbell Soup Co.*, 237 F.3d 701, 702-09 (6th Cir. 2001) (plaintiff's employer created a file on his back injuries, referred to him as the "back case," followed him to medical appointments, commented "we can't have any more of this back thing," stated on a job accommodation form that he was disabled, and provided false performance-based reasons for his termination); *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1224-25, 1228-29 (9th Cir. 2001) (plaintiff's employer refused to consider her for thirteen job openings, provided false reasons for such refusal, and told her "maybe you'll get a [medical] release, and you can apply for another job").

Petitioner urges that two circuit courts have rejected such use of pretext evidence, thereby creating a split of authority on the issue. Pet. at 11-12. To the contrary, the differing decisions among the courts are attributable to the different factual scenarios presented in the cases. *See generally* Jennifer Schechter Sharret, *Refining the Production Burden for "Regarded as Disabled" Claimants*, 28 Cardozo L. Rev.

991, 1009-11 (2006) (recognizing factual variance among the cases).

For instance, Petitioner contends that the Seventh Circuit rejects any such use of pretext evidence. Pet. at 12. It is true that the court declined to consider a plaintiff's disagreement with the stated reasons for his termination, when – in contrast to the substantial evidence presented in *Moorer*, *Ross*, and *Johnson* – he offered no evidence showing that his employer perceived him as disabled or terminated him because of his medical condition. *Nese v. Julian Nordic Constr. Co.*, 405 F.3d 638, 641-43 (7th Cir. 2005). However, in an earlier case, the Seventh Circuit expressly considered the plaintiff's pretext evidence, along with his other evidence, in concluding that he failed to create a triable issue as to whether he was regarded as disabled. *Mack v. Great Dane Trailers*, 308 F.3d 776, 783 (7th Cir. 2002). Thus, the Seventh Circuit has not, as Petitioner suggests, categorically held that pretext evidence can never play a role in the regarded-as-disabled analysis.

Petitioner also argues that the Tenth Circuit rejects the use of pretext evidence to establish that a plaintiff is regarded as disabled. Pet. at 11. Yet in this case, as in the only other Tenth Circuit case considering the issue, the plaintiff did not present any pretext evidence. In *Rakity v. Dillon Companies*, the court found that the *McDonnell Douglas* framework, including the pretext analysis, did not apply because "[t]he framework is only necessary where a defendant claims the adverse employment action was made for

reasons other than the plaintiff's membership in a protected class," but in that case "[the employer] freely admit[ted] the decision not to promote Mr. Rakity was made because of Mr. Rakity's lifting restriction." 302 F.3d 1152, 1165 (10th Cir. 2002). The court accordingly found that the plaintiff's reliance on *Ross* was "misplaced." *Id.*

Indeed, the *Rakity* court did not summarily reject the Sixth Circuit's holding in *Ross*, but simply rejected the plaintiff's misapplication of *Ross* to suggest that "the issue of pretextually concealed discrimination and the issue of 'regarded as' disabled should be treated as one and the same." *Id.* This did not create any conflict among the circuits: the fact that the Tenth Circuit recognized that these are separate issues does not signify that evidence of one issue could not also support a finding as to the other.

Similarly, in this case, the Tenth Circuit did not rule that courts could never consider pretext evidence in the regarded-as-disabled analysis. Nor did it cite or apply the *McDonnell Douglas* framework. Rather, the court simply held that there was no pretext evidence in this case: "Mountain Coal has disputed whether it categorically applies its 'no-restrictions policy,' but has not given any alternative reason for firing Mr. Dillon. Thus, Mountain Coal cannot be said to have created a pretextual reason for firing him." Pet. App. 13a.

Therefore, there is no actual split of authority on this issue; and even if there were, it would not impact

this case because pretext evidence was never at issue. Petitioner highlights certain facts that were disputed at trial, such as the extent to which the no-restrictions policy was enforced, Petitioner's ability to perform certain job assignments within his lifting restrictions, and certain events leading up to his termination. Pet. at 15. Yet these contested facts have nothing to do with pretext – particularly as the reason for Petitioner's termination (*i.e.*, that Mountain Coal believed he could not perform his job duties consistent with his restrictions and was not qualified to perform any of the vacant positions at the mine) was never in dispute.

Finally, in enacting the ADAAA in 2008, Congress fundamentally altered the analysis in regarded-as-disabled cases, which also impacts the effect of pretext evidence. Now, regarded-as-disabled plaintiffs no longer need to show that they are perceived as substantially limited in their ability to work or engage in any other major life activity – and thus no longer need to prove that they are perceived as substantially limited in their ability to work in a class or broad range of jobs. It will be sufficient simply to show that they are subjected to some employment action "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A) (2008).

In prior cases, courts applied an expansive view of pretext evidence specifically because of the difficulties inherent in proving that an individual is

regarded as substantially limited in the major life activity of working. *See*, *e.g.*, *Ross*, 237 F.3d at 709 (noting that such a claim "takes a plaintiff to the farthest reaches of the ADA" and is "extraordinarily difficult" to prove). Now that plaintiffs no longer have to prove they are regarded as substantially limited in a major life activity – only that they have a perceived impairment, regardless of whether it restricts any major life activities – the courts will have to reassess whether and to what extent pretext evidence applies in the *McDonnell Douglas* analysis. Reviewing this case would not resolve these new issues, which should be decided initially by the lower courts.

II. Petitioner has shown no compelling reason for this Court to consider whether a plaintiff must present job market evidence to prove that he is regarded as disabled in the ability to work.

Petitioner claims that the circuit courts are split on the issue of whether ADA plaintiffs must present evidence of the job market in the relevant geographic area in order to prove they are regarded as disabled in the major life activity of working. Pet. at 17-23. Here, too, there is no circuit split. Rather, the courts have consistently applied this Court's prior decisions and the EEOC's regulations in determining whether a plaintiff has made a sufficient showing in each particular case. Because the issue of whether a person is regarded as disabled is individualized in nature, the extent to which plaintiffs must present

evidence of the relevant job market necessarily depends on the other types of evidence they provide showing that they are regarded as substantially limited in their ability to work. Thus, no split of authority exists. Moreover, this issue, too, is moot under the 2008 amendments to the ADA, further militating against certiorari review.

In *Sutton*, this Court applied the EEOC's regulations (which the Court assumed, without deciding, were valid) to conclude that plaintiffs who allege they were regarded as disabled in the major life activity of working must prove they were perceived as substantially limited in their ability to work in a "broad class" or "broad range" of jobs. *Id.* at 491-93. The Court ultimately held that two plaintiffs' proof that they were regarded as unable to work as global airline pilots due to their vision impairments was insufficient, even if the plaintiffs assumed that other employers would apply the same vision requirements that had disqualified them from working as pilots for the defendant. As the Court noted, "[i]t is not enough to say that if the physical criteria of a single employer were *imputed* to all similar employers one would be regarded as substantially limited in the major life activity of working *only as a result of this imputation*." *Id.* at 493 (emphasis in original). Because the plaintiffs had not shown that their employer believed their vision impairments substantially limited them from working in other positions utilizing their skills, their claims failed. *Id.* at 493-94.

In *Murphy*, this Court again applied the EEOC's regulations and found that the plaintiff, a mechanic diagnosed with hypertension, had not satisfied his burden of showing he was regarded as disabled in the major life activity of working. 527 U.S. at 523-24. Specifically, the Court found that the plaintiff was, "at most, regarded as unable to perform only a particular job" – that of mechanic in a job requiring him to drive commercial motor vehicles – which was not sufficient to establish a claim. *Id.* at 525.

Consistent with *Sutton*, *Murphy*, and the EEOC's regulations, the circuit courts have held that a plaintiff seeking to prove he is regarded as disabled in the major life activity of working must show that his employer believed he was unable to perform a class or a broad range of jobs. The courts have further held that this required showing includes evidence of alternative jobs in the relevant geographic market when other evidence is insufficient on its own to establish the regarded-as-disabled issue.

For instance, in *EEOC v. Rockwell International Corp.*, the Seventh Circuit declined to "create a *per se* rule that a plaintiff cannot prevail without quantitative evidence of the precise characteristics of the local job market," but noted that "this is not one of the rare cases in which the claimants' impairments are so severe that their substantial foreclosure from the job market is obvious." 243 F.3d 1012, 1017 (7th Cir. 2001). The court ultimately affirmed the summary dismissal of the plaintiffs' regarded-as-disabled claims, stating that "the Commission had to come up

with some evidence of the number and types of other jobs in Southern Illinois from which the job applicants would be excluded because of their perceived impairments," but failed to do so. *Id.* at 1017-18.

The other circuit courts have similarly held that plaintiffs cannot prevail on regarded-as-disabled claims without showing that they were perceived as unable to perform a class or a broad range of jobs, as those terms are defined in the regulations. *See, e.g.*, *Milholland*, 569 F.3d at 568; *Sullivan v. Neiman Marcus Group, Inc.*, 358 F.3d 110, 117-18 (1st Cir. 2004); *Cooper v. Olin Corp.*, 246 F.3d 1083, 1089-90 (8th Cir. 2001); *Witter v. Delta Air Lines, Inc.*, 138 F.3d 1366,1370-71 (11th Cir. 1998); *Bridges v. City of Bossier*, 92 F.3d 329, 334-36 (5th Cir. 1996).[4]

The Tenth Circuit's decision fits well within this line of authority. The court applied the same legal standards in determining that Petitioner failed to show that Mountain Coal regarded him as substantially limited in his ability to work in either a class of mining jobs within the relevant geographic

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[4] *Duncan v. Washington Metropolitan Area Transit Authority*, cited by Petitioner, Pet. at 19-20, applies a similar test concerning disabilities in the major life activity of working, but is not on all fours with this line of cases because the plaintiff alleged that he was *actually* disabled, rather than *regarded as* disabled. 240 F.3d 1110, 1114-16 (D.C. Cir. 2001). Nonetheless, as the case suggests, the courts apply similar standards to actual disability cases.

area or a broad range of other jobs within that area. Pet. App. 5a-13a.

Petitioner cites only two federal cases that he argues represent a contrary view. Pet. at 18-19. In truth, neither case reveals any split of authority on the issue of whether evidence of the relevant job market is required in regarded-as-disabled cases concerning the ability to work.

In *Mullins v. Crowell*, the Eleventh Circuit in fact confirmed that plaintiffs seeking to show they are actually (as opposed to regarded as) disabled in the ability to work must provide evidence of the jobs available to them in the relevant geographic area. 228 F.3d 1305, 1314 n.18 (11th Cir. 2000). The court merely stated that such plaintiffs are not required to present *expert testimony* on this issue. *Id.* Petitioner quotes at length from the opinion, Pet. at 18, but replaces with ellipses the words that establish this point:

> [B]ecause we have been instructed that we "may" and "should" (not "shall" or "must") consider the existence of jobs in the relevant geographical area, without reference to whether a vocational expert is required, we conclude that expert vocational evidence, although instructive, is not necessary to establish that a person is substantially limited in the major life activity of working. Furthermore, a plaintiff could testify from his or her own extensive job search whether other jobs

> that he or she could perform were available in the geographical area.

Id. (omitted words indicated in underscoring).

Additionally, in *Wellington v. Lyon County School District*, the Ninth Circuit held that a plaintiff proved he was actually (rather than regarded as) disabled in the ability to work, although he did not present evidence of the jobs available to him in the area. 187 F.3d 1150, 1155 (9th Cir. 1999). However, the plaintiff, a janitor who suffered from carpal tunnel syndrome, had established through other evidence that he was substantially limited in his ability to perform a class or broad range of jobs: he testified that his prior work experience was limited to manufacturing, construction, heavy maintenance, and plumbing and that "he had to quit a job performing even *light* plumbing because he 'was in too much pain to even continue'"; and his doctor testified that he was "permanently unable to perform work involving 'metal fabrication, welding, . . . heavy activities, carpentry, . . . the use of a variety of tools to do maintenance repairs, et cetera.'" *Id.* (emphasis in original) (citations omitted).[5]

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[5] In another case cited by Petitioner, Pet. at 21-22, an Iowa state court similarly concluded that the plaintiff had created a triable issue as to whether she was actually disabled in the activity of working, because she showed that "she cannot do *any* production line work to which she has reasonable access" and such production line work could constitute a class of jobs.

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In a later case, the Ninth Circuit distinguished *Wellington* and clarified that "[u]nder the law of our circuit, a plaintiff must present evidence about relevant job markets to defeat summary judgment on a claim of substantial limitation of 'working.'" *Thornton v. McClatchy Newspapers*, 261 F.3d 789, 795-96 (9th Cir. 2001). In finding that the plaintiff had failed to satisfy this burden, the court noted that "*Wellington* involved unrebutted medical evidence about the various types of jobs from which the plaintiff was permanently restricted," but "there was no such evidence of restriction" and no evidence about the relevant job market in the latter case. *Id.* at 796.

These cases do not reveal any circuit split on the requirement of evidence concerning the relevant job market in regarded-as-disabled cases involving the ability to work. Rather, they demonstrate that the courts consistently apply the legal standards set forth by this Court's prior decisions and the EEOC's regulations, while illustrating that the issue of whether a person is disabled or regarded as disabled is individualized in nature. *See generally Sutton*, 527 U.S. at 483 ("[W]hether a person has a disability under the ADA is an individualized inquiry."); *Toyota Motor Mfg.*, 534 U.S. at 198 ("That the Act defines 'disability' 'with respect to an individual,' 42 U.S.C. § 12102(2), makes clear that Congress intended the

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Bearshield v. John Morrell & Co., 570 N.W.2d 915, 922 (Iowa 1997) (emphasis in original).

existence of a disability to be determined in . . . a case-by-case manner.").

Finally, this issue is also moot under the recently-modified language of the ADA. Plaintiffs alleging that they are regarded as disabled no longer must prove that they are perceived to be substantially limited in a major life activity, but only need to show that they are subjected to some action "because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3)(A) (2008). This eviscerates the requirement that plaintiffs in cases such as this one prove that their employer believed they were incapable of performing a class or a broad range of jobs. The fact that the issue raised by Petitioner is no longer relevant strongly warrants against certiorari review.

III. Petitioner has shown no compelling reason for this Court to consider whether a plaintiff may prove he is regarded as disabled in the ability to work through evidence of jobs at a single facility.

Petitioner urges that the circuit courts disagree on the issue of whether a plaintiff can establish that he is regarded as disabled in the major life activity of working based solely on evidence of the positions available within a single facility. Pet. at 24-30. Again, there is no circuit split on the issue. The courts have agreed on the applicable legal standards and have

simply applied those standards to the facts of each case – including facts about other jobs a plaintiff was deemed incapable of performing – to ascertain whether the plaintiff showed that he was perceived as unable to perform a class or broad range of jobs. Also, again, the issue is moot under the 2008 amendments to the ADA, which eliminate the requirement that regarded-as-disabled plaintiffs prove they are regarded as substantially limited in a major life activity. Therefore, there is no compelling reason to grant certiorari review.

Applying the well-settled legal standards set forth in *Sutton*, *Murphy*, and the regulations, the circuit courts have agreed that a regarded-as-disabled plaintiff may satisfy his burden of proof based solely on evidence that he is perceived as incapable of performing any position for a single company – but only when he establishes that the positions within that one company can themselves constitute a class or a broad range of jobs.

For instance, in *D'Angelo v. ConAgra Foods, Inc.*, the Eleventh Circuit stated, in *dicta*, that the plaintiff presented sufficient evidence that she was regarded as disabled where her employer admitted that it believed her vertigo prevented her from being around any moving equipment and precluded her from "a wide range of jobs" within its seafood processing plant, including stacker, product transporter, saw operator, stein operator, checker, forklift driver, area specialist, line leader, machine operator, packer, and spreader. 422 F.3d 1220, 1222, 1228 n.5 (11th Cir.

2005) (citation omitted). The court concluded that "[s]uch a far-reaching impairment – which would disqualify her from the entire class of factory jobs, and from many others – would substantially limit D'Angelo's ability to work." *Id.* at 1228 n.5.

The other cases cited by Petitioner are consistent with this approach. *See Rodriguez v. ConAgra Grocery Prods. Co.*, 436 F.3d 468, 477 (5th Cir. 2006) (defendant believed plaintiff was "unfit to perform *any* manual labor job" and was not qualified for any jobs at its food processing plant, including an entry level position "requir[ing] only the most basic skills and abilities") (emphasis in original); *Moorer*, 398 F.3d at 484 (defendant believed plaintiff could not perform any managerial work for the defendant, including such varied tasks as "planning hospital affairs, coordinating reporting requirements between different departments, directing human resource programs, serving as a liaison between staff and management, ensuring regulatory compliance, coordinating the budget process, facilitating a positive work environment, ensuring the proper level and mix of services, coordinating risk management, creating continuing education programs, and spearheading cost-saving techniques"); *Buskirk v. Apollo Metals*, 307 F.3d 160, 163, 167 (3d Cir. 2002) (defendant believed plaintiff could not perform any jobs involving "general physical activity," including such positions within its metal making plant as slitter helper, polisher, finish helper, box maker, and pre-polisher) (citation omitted). *See also Cook v. Rhode Island*, 10 F.3d 17,

25-26 (1st Cir. 1993) (concluding, under similar provisions of the Rehabilitation Act, that plaintiff showed she was regarded as handicapped in her ability to work through evidence that she was denied "a single job that requires no unique physical skills" and was perceived as "foreclosed [from] a broad range of employment options in the health care industry, including positions such as community living aide, nursing home aide, hospital aide, and home health care aide").[6]

The Tenth Circuit has applied the same approach, demonstrating that there is no circuit split on this issue. In a decision released just a year before the decision in this case, the Tenth Circuit held that a plaintiff created a triable issue as to whether he was regarded as disabled in the major life activity of working based on evidence of the jobs available at a single plant. *Justice v. Crown Cork & Seal Co.*, 527 F.3d 1080, 1087-88 (10th Cir. 2008). In *Justice*, the court held that the plaintiff, an electrician, satisfied his burden of proof by showing that his employer believed his vertigo and balance problems significantly restricted him from "perform[ing] an entire class of jobs utilizing his skills, i.e., those jobs in the electrical field," stated that he could perform only "one or two jobs among the variety of jobs in the

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[6] The other case cited by Petitioner is inapplicable, because it involved the major life activity of *walking* – not working. *EEOC v. E.I. DuPont de Nemours & Co.*, 480 F.3d 724, 729-30 (5th Cir. 2007).

plant," and considered him only for the position of janitor. *Id. See also Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1134 (10th Cir. 2003) (plaintiff created a factual issue as to whether she was regarded as disabled based on evidence of jobs within a single company, insofar as the defendant failed to consider her for a position at a time when it was hiring 200 to 300 people per week).

The Tenth Circuit reached a different conclusion in this case – not because it was departing from *Crown Cork*, *Doebele*, and similar cases, but because Petitioner did not show "that the jobs within the mine could properly be described as a 'class of jobs' or a 'broad range of jobs.'" Pet. App. 11a. Specifically, the court explained, Petitioner "show[ed] only that West Elk Mine had a variety of mining jobs," but not "that those jobs fell into different classes, or that the jobs would require different skills and training from [Petitioner's] job at the mine." *Id.*

Accordingly, there is no circuit split warranting certiorari review of this issue. Moreover, yet again, the issue is moot under the current language of the ADA, which no longer requires that regarded-as-disabled plaintiffs show they are perceived as substantially limited in a major life activity. For these reasons, the Court should deny the Petition.

IV. Petitioner has shown no compelling reason for this Court to consider whether no-restrictions policies are evidence of whether an employee is regarded as disabled in the ability to work.

Petitioner contends that the circuit courts have reached conflicting decisions as to whether a no-restrictions or 100%-healed policy may be used to show that an employer regards an individual as disabled in the major life activity of working. Pet. at 30-36. There is no such conflict, as the Tenth Circuit's conclusion that such policies may be evidence of a perceived disability – but are not themselves conclusive evidence of any such perceived disability – accords with the decisions of other circuits. Additionally, once again, the issue is moot under the ADAAA. Thus, there is no compelling reason for certiorari review.

Petitioner is correct that some circuit courts have held that no-restrictions or 100%-healed policies may constitute *per se* evidence of discrimination under the ADA. Pet. at 31-33. However, such holdings are limited to instances where employees are found to be "qualified individuals with disabilities" covered by the Act.

The Third Circuit recently addressed this issue in reversing the certification of a class of individuals alleging violation of the ADA through application of a 100%-healed policy and other actions involving failure to reasonably accommodate disabilities. *Hohider*

v. United Parcel Serv., 574 F.3d 169, 172-73, 186-98 (3d Cir. 2009). The plaintiffs argued that a 100%-healed policy is *per se* unlawful and, thus, that once they established the existence of such a policy they would need no further proof to establish liability under the ADA. *Id.* at 194-95.

The *Hohider* court rejected the plaintiffs' argument, stating that even if such a policy were a *per se* violation of the ADA, the plaintiffs still would have to prove they were disabled within the meaning of the Act: "[A]n employer's '100% healed' policy, even if deemed per se discriminatory, cannot give rise to a finding of liability and relief under the ADA without the statutorily required inquiry into whether those affected by the policy are disabled. . . ." *Id.* at 195. The court further held that the issue of whether individual plaintiffs were qualified individuals with disabilities could not be determined on a class-wide basis because it was an individualized inquiry. *Id.* at 196-98.

The Sixth Circuit arrived at the same conclusion, stating that "a 100% [healed] rule is impermissible as to a *disabled* person – but one must first be disabled." *Henderson v. Ardco, Inc.*, 247 F.3d 645, 653 (6th Cir. 2001) (emphasis in original). The court also rejected the plaintiff's argument that it should simply find that the 100%-healed rule was a *per se* violation of a state law mirroring the provisions of the ADA, finding that this argument "foreshortens the inquiry." *Id.* at 648-49, 653.

The fact that the Ninth Circuit has held that a 100%-healed policy is a *per se* violation of the ADA does not suggest that there is a split of authority on the issue. *See McGregor v. Nat'l R.R. Passenger Corp.*, 187 F.3d 1113, 1116 (9th Cir. 1999). As *Hohider* and *Henderson* suggest, this holding is inconsequential unless an individual is actually covered by the Act. Indeed, the *McGregor* panel stated only that a 100%-healed policy "discriminates against qualified individuals with disabilities," but never expressed that a plaintiff would automatically qualify as a disabled (or regarded-as-disabled) individual under the Act simply by proving such a policy existed. *Id.* at 1115-16. Moreover, in a later case, the Ninth Circuit treated a no-restrictions policy as evidence that an employee was regarded as disabled in the ability to work, but did not suggest that the existence of the policy could by itself prove such a claim. *Johnson*, 251 F.3d at 1128.

Nor did the Tenth Circuit's decision in this case create any circuit conflict. The court determined that Petitioner had not presented sufficient evidence to prove that he was regarded as disabled. Given that Petitioner failed to show that he fell within the provisions of the ADA, the existence or application of the alleged no-restrictions policy is legally irrelevant.

The Tenth Circuit did, however, recognize, consistent with the other circuits, that a no-restrictions policy may be considered along with other evidence in determining whether a plaintiff was regarded as disabled in the major life activity of working.

For instance, as indicated above, the Ninth Circuit in *Johnson* reviewed a 100%-healed policy, along with a multitude of other evidence – including the employer's refusal to consider her for thirteen job openings, provision of false reasons for such refusal, and comment that "maybe you'll get a [medical] release, and you can apply for another job" – in finding that the plaintiff had offered sufficient evidence to show that she was regarded as unable to work in a class or broad range of jobs. 251 F.3d at 1226-29.

Similarly, the Sixth Circuit found that evidence of the plant manager's testimony that "there is not a job at the plant that [the plaintiff's] restrictions would not bump into" and the variety of positions at the plant that would not infringe upon her restrictions were sufficient, along with evidence of a 100%-healed policy, to avoid summary judgment on a regarded-as-disabled claim under state law. *Henderson*, 247 F.3d at 648-54. The court found that this evidence suggested that the plaintiff's employer believed she was "incapable of work in a manufacturing operation." *Id.* at 652. However, the court noted that at trial, the plaintiff would have to present evidence "to show that manufacturing presents a significant portion of the jobs locally available to her." *Id.* at 653 n.5.

In this case, the Tenth Circuit did not conclude that the no-restrictions policy could not be used to support Petitioner's claims. Rather, it simply held that the policy was not itself sufficient to satisfy Petitioner's burden of showing that he was regarded

as disabled in the ability to perform a class or broad range of jobs, and that Petitioner had not presented sufficient additional evidence to make that showing. Pet. App. 10a-11a. Thus, the decision is fully consistent with *Johnson* and *Henderson* and does not create any circuit split relating to no-restrictions policies.

Additionally, the ADAAA substantially altered the analysis on this issue. ADA plaintiffs asserting regarded-as-disabled claims no longer need to show that they are perceived as substantially limited in any major life activity. Thus, the purpose for which the Tenth Circuit reviewed the no-restrictions policy – the issue of whether Petitioner proved he was regarded as substantially limited in the major life activity of working – is no longer pertinent. The Petition should, therefore, be denied.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Dated: December 22, 2009.

Respectfully submitted,

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APPENDIX – REGULATIONS INVOLVED

29 C.F.R. § 1630.2

(j) Substantially limits –

(1) The term substantially limits means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

(3) With respect to the major life activity of working –

(i) The term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having

comparable training, skills and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

(ii) In addition to the factors listed in paragraph (j)(2) of this section, the following factors may be considered in determining whether an individual is substantially limited in the major life activity of "working":

(A) The geographical area to which the individual has reasonable access;

(B) The job from which the individual has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (class of jobs); and/or

(C) The job from which the individual has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills or abilities, within that geographical area, from which the individual is also disqualified because of the impairment (broad range of jobs in various classes).

* * *

(l) Is regarded as having such an impairment means:

(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation;

(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(3) Has none of the impairments defined in paragraph (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

Supreme Court, U.S.
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No. 09-510

IN THE

Supreme Court of the United States

JARED L. DILLON,

Petitioner,

v.

MOUNTAIN COAL COMPANY, L.L.C.; ARCH WESTERN RESOURCES, L.L.C., a Delaware Corporation; ARCH COAL, INC., a Delaware Corporation,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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FURTHER REASONS FOR GRANTING THE PETITION

I. THE ISSUES PRESENTED IN THE PETITION REMAIN RELEVANT REGARDLESS OF THE PASSAGE OF THE ADAAA

Many of the legal issues affecting the ADA will continue to exist under the ADAAA, including how one proves a substantial limitation in the major life activity of working. The ADAAA made it clear that working is a major life activity. 42 U.S.C. § 12102(2)(A).[1] However, Congress did not change the existing definition of working as a major life activity. This means that cases clarifying the evidence needed to prove a significant limitation in working under the ADA will continue to provide guidance under the ADAAA.

MCC argues against the petition by attempting to limit the issues presented in the petition. MCC repeatedly states that Congress changed the definition of regarded as disabled in the ADAAA. However, even MCC admits in footnote 4 that the standards are similar for determining whether someone is actually disabled with respect to the major life activity of working, or regarded as disabled with respect to the major life activity of working. The standards are similar due to this Court's admonition that to be regarded as disabled, the employer must believe the employee is substantially

[1] Although MCC asserts in a footnote that working is not a major life activity under the ADA, it failed to preserve this issue for review in either of the lower courts, so it is not an issue properly presented to this court.

limited in a major life activity, as those terms are defined in the ADA. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 489-494 (1999). Therefore, the same types of evidence which are either required to demonstrate, or do demonstrate, a perceived disability with respect to working would also be used in regard to an actual, or record of, disability with respect to working.

The question of what is proper evidence of pretext does not go away with the ADAAA. It not only remains with the ADAAA, but applies to virtually all discrimination cases. An ADAAA plaintiff must still demonstrate that an employer's reasons for termination are pretextual. The question presented here is whether the fact that MCC admitted Dillon's impairments played a role in its decision, but lied about the role they played, constitutes pretext evidence. This question will remain relevant under the ADAAA.

Furthermore, the proper use of pretext evidence to prove the other elements of a claim remains relevant not only under the ADAAA, but also other discrimination cases. This Court has repeatedly emphasized that pretext evidence is also affirmative evidence of liability, but this is a directive the lower courts have been reluctant to accept.

Finally, any decision regarding the ADA, including the proper use of a "no restrictions" policy will continue to have long-lasting effect. As noted in the parties' statements of facts, Dillon was terminated in 2000, and brought suit in 2001. It was not until 2009, that an appellate decision was reached in his case. The ADAAA did not take effect until January 1, 2009, and is not

retroactive. It can reasonably be assumed that there are innumerable ADA cases initiated between 2002 and 2009 that are awaiting a final determination. Further, if the ADAAA only applies to actions taken after its effective date, cases could still be filed that fall within the ADA. A decision by this Court would affect these continuing, and potentially future, cases.

II. THE CIRCUITS HAVE DIVERGENT VIEWS ON THE PROPER ROLE OF PRETEXT EVIDENCE, AND THESE VIEWS CANNOT BE RECONCILED BASED ON THE FACTS OF THE CASES

MCC attempts to reconcile the divergent views of the circuits on the use, and definition, of pretext evidence by arguing they are distinguishable on their facts. This is an attempt to reconcile the irreconcilable. MCC cites a law review article as recognizing the factual distinctions between the cases decided in the various circuits. Jennifer Schechter Sharret, Note: *Refining the Production Burden for "Regarded As Disabled" Claimants*, 28 Cardozo L. Rev. 991, 1009-1011 (November 2006). However, the author ultimately rejects the conclusion that the cases can be reconciled based on their facts, because of the differing legal analysis engaged in by the courts. *Refining the Production Burden*, *supra* at pp. 1009-1011.

The article explains that the Sixth Circuit allows an ADA plaintiff to utilize evidence of pretext in proving the plaintiff falls within the protected class of being regarded as disabled. *Refining the Production Burden*, *supra* at pp. 993-994, 1004, 1007-1008. However, the Seventh and Tenth Circuits require the ADA plaintiff

to first prove membership in the protected class before ever being allowed to use pretext evidence, and never have the opportunity to use the inference permitted by *Reeves v. Sanderson Plumbing Prods., Inc. Refining the Production Burden*, *supra* at pp. 993-994, 1004, 1007-1008. The article ultimately concludes that "[t]he circuit split emerges from different procedural views on when and how an ADA plaintiff must show that he was regarded as disabled." *Refining the Production Burden*, *supra* at pp. 1008-1009.

This distinction in the views of the courts is why the cases cannot be reconciled on their facts. The Seventh Circuit stated, "the employee must first establish that she falls into a protected group before we look at either real reasons or pretextual ones for the employment action." *Nese v. Julian Nordic Constr. Co.*, 405 F.3d 638, 642 (7th Cir. 2005). The Tenth Circuit, incorrectly, explained that pretext evidence has no role outside of the *McDonnell Douglas* framework. *Rakity v. Dillon Cos.*, 302 F.3d 1152, 1164-1166 (10th Cir. 2002). The court in this case declined to consider evidence of pretext, stating the question was not why MCC terminated Dillon, but whether he was in the protected class. This necessarily limits the use of pretext to its role in the *McDonnell Douglas* test, as in *Rakity*, because it fails to consider pretext with respect to whether Dillon is in the protected class.

This view cannot be reconciled with the view of the Sixth Circuit, which explicitly holds that pretext evidence is not limited to its role in the *McDonnell Douglas* framework, but may be considered at any stage and to prove any element. *Ross v. Campbell Soup Co.* 237 F.3d 701, 708-709 (6th Cir. 2001); *Moorer v. Baptist Mem'l Ctr. Health Care*, 398 F.3d 469, 481-483 (6th Cir.

2004). In *Moorer*, the Sixth Circuit suggested that additional evidence was needed besides pretext to show an individual was regarded as disabled. This still leaves it in conflict with the Tenth and Seventh Circuits, which do not consider pretext at all.

The Ninth Circuit is consistent with the Sixth Circuit. *Johnson v. Paradise Valley Unified Sch. Dist.*, 251 F.3d 1222, 1228-1229 (9th Cir. 2001). The court held "[Defendant's] arguably pretextual explanations *themselves* could appropriately be considered as affirmative evidence of the [Defendant's] motivation in rejecting [Plaintiff's] applications." *Id.* at 1228 (emphasis added). Pretext evidence allows the inference that the employer is lying to cover up its belief the employee is disabled. *Id.* at 1229.

The Tenth Circuit ignored MCC's numerous falsehoods for why it terminated Dillon's employment. Although acknowledging that Dillon's impairment played a role in its decision, MCC lied about the role it played. As noted by this Court in *Reeves*, pretext evidence is essentially similar to consciousness of guilt evidence; it is evidence of acts taken out of knowledge of liability. *Reeves v. Sanderson Plumbing Prods., Co.*, 530 U.S. 133, 147 (2000). This Court should reconfirm its opinion in *Reeves* that pretext evidence may be used as affirmative evidence of liability in discrimination cases.

III. MCC'S OPPOSITION BRIEF MERELY SUCCEEDS IN DEMONSTRATING THE DIVERGENT VIEWS IN REGARD TO THE STRICT NECESSITY OF EVIDENCE OF THE GEOGRAPHIC AREA WHEN AN ADA CLAIM INVOLVES THE MAJOR LIFE ACTIVITY OF WORKING

MCC does not dispute that the Tenth Circuit utilizes a strict requirement for the presentation of quantitative geographical evidence to prove a substantial limitation in the major life activity of working. On page nine, twelve and thirteen of the opinion, the Tenth Circuit reiterates this requirement.

The cases cited by MCC either do not have such a strict requirement, or simply do not address the issue. The ability of the circuit courts to recite black letter law, or quote regulations, does *not* mean those courts are applying the law in a uniform manner. This Court should not fall into the same mistake as MCC and mistake uniform recitation of the law for uniform application.

MCC complains that Dillon used an ellipse to remove a portion of the quoted language from *Mullins v. Crowell*, 228 F.3d 1305, fn. 18 (11th Cir. 2000). However, the removed language does not alter the meaning or import of the quote. The Eleventh Circuit was clearly stating that geographic evidence was not necessarily required, because the words "should" and "may" are not words of command, like "shall" or "must." *Id.* The court went on to hold that as geographic evidence is not itself required, expert evidence is clearly not

required. *Id.* Further, the geographic evidence relied upon by the *Mullins* court, qualitative descriptions of the plaintiff's own job seeking efforts, is no different from that presented by Dillon. Despite the similar evidence, there were divergent results, further demonstrating the circuit split.

MCC also argues there is no split between the Ninth and Tenth Circuits, because a later Ninth Circuit holding in *Thornton v. McClatchy Newspapers*, 261 F.3d 789 (9th Cir. 2001), distinguished *Wellington v. Lyon County School District*, 187 F.3d 1150 (9th Cir. 1999). *Thornton* does not purport to overrule *Wellington*. *Thorton* stated that because the plaintiff in *Wellington* presented unrebutted medical evidence of a number of jobs he could not perform, he did not have to present evidence regarding the geographic area. *Thornton*, 261 F.3d at 796. This still leaves the Ninth Circuit in conflict with the Tenth Circuit, which has a strict requirement regarding geographic evidence.

MCC largely ignores the case of *Bearshield v. John Morrell & Co.*, 570 N.W.2d 915 (Iowa 1997). *Bearshield* addressed the issue of both being actually disabled and regarded as disabled with respect to the major life activity of working. 570 N.W.2d at 920-924. In each instance it looked at the requirements of the job, rather than the geographic area of the plaintiff. *Id.* The evidence relied upon was remarkably similar to that presented by Dillon, including the existence of a 100% healed policy. *Id.*

MCC also discusses the Seventh Circuit decision in *EEOC v. Rockwell Int'l. Corp.*, 243 F.3d 1012 (7th Cir.

2001). However, even MCC admits that the Seventh Circuit declined to adopt a categorical rule requiring quantitative evidence regarding jobs in the geographic area. *Id.* at 1017. This conflicts with the Tenth Circuit. Further, the dissent in *Rockwell* felt that even the test imposed there was too strict. *Id.* at 1018-1021 (Wood Dissent). The other cases cited by MCC do not address the requirement of presenting geographic evidence. They merely recite various formulations of the ADA requirements without application. Thus, they provide no guidance as to the existence of a circuit split.

IV. THERE IS A SPLIT IN THE CIRCUITS REGARDING WHETHER THE INABILITY, REAL OR PERCIEVED, TO WORK FOR ONE COMPANY CAN RAISE AN INFERENCE OF AN INABILITY TO WORK IN A CLASS OR BROAD RANGE OF JOBS

Despite MCC's actempts to harmonize the cases from other circuits cited by Dillon with the Tenth Circuit's decision here, the cases are clearly contradictory. Under the cases from other circuits cited by Dillon, he would have raised a question of fact as to whether he was regarded as disabled. Under both Third Circuit and Eleventh Circuit precedent, the perceived inability to perform any job of the many in the facility would have raised an inference as to the perceived inability to perform any job in the industry. *Buskirk v. Apollo Metals*, 307 F.3d 160 (3rd Cir. 2002); *D'Angelo v. ConAgra Foods*, 422 F.3d 1220 (11th Cir. 2005). In particular, there is no principled distinction between Dillon's case and *D'Angelo*. In *D'Angelo*, the employer believed the plaintiff's vertigo prevented her from

working any job in its packing plant, which allowed the inference it believed she could do no job in factory work. 422 F.3d at 1229. There is no meaningful distinction between a perceived inability to work in one packing plant raising an inference of a perceived inability to do factory work, and a perceived inability to work in a coal mine raising an inference of an inability to work in mining. Even the decision in *EEOC v. E.I. DuPont de Nemours*, 480 F.3d 724 (5th Cir. 2007) supports Dillon's position in its principle. There, the perceived inability to walk in the facility allowed a greater inference of a perceived substantial limitation in walking in general.

Dillon's case is also indistinguishable from those that allow an inference of a perceived substantial limitation in working to be arrived at from the perceived inability to perform a single job. These cases arise out of the First, Fifth, and Sixth Circuits. The circumstances of this case and *Rodriguez v. ConAgra*, 436 F.3d 468 (5th Cir. 2006) are remarkably similar. Dillon presented evidence that MCC perceived him as unable to perform a job that only required lifting fifteen pounds due to his lifting restrictions. As was the case for the plaintiff in *Rodriguez*, if Dillon could not perform this job, he would be unable to perform almost any manual labor job, let alone any mining job.

The Tenth Circuit rejected the above holdings that allowed an inference of a substantial limitation in working to be arrived at by an inability to work one job, or at one facility. The Tenth Circuit held that the perceived inability to work at any job for MCC raised no inference about the perceived inability to work in a class or broad range of jobs. MCC attempts to harmonize

the cases by referring to the Tenth Circuit's discussion of its earlier holding in *Justice v. Crown Cork & Seal Co.*, 527 F.3d 1080 (10th Cir. 2008). The *Dillon* panel read into *Justice* the requirement of proof that the work in the facility itself constitutes a broad range of jobs. None of the other circuits even discuss the requirements of such evidence, let alone hold that such evidence is necessary. MCC tries to impose the *Dillon* court's evidentiary requirements onto the other circuits, but none of the other circuits has adopted this requirement.

V. THE TENTH CIRCUIT'S LIMITATION ON THE USE OF A NO RESTRICTIONS POLICY IN A REGARDED-AS-DISABLED CASE CANNOT BE RECONCILED WITH THE HOLDINGS OF THE SIXTH AND NINTH CIRCUITS

The Sixth and Ninth Circuits have held that a no restrictions, or 100% healed, policy is evidence that an ADA plaintiff is regarded as disabled and will prevent a defendant from obtaining judgment as a matter of law. *Henderson v. Ardco*, 247 F.3d 645 (6th Cir. 2001); *Johnson v. Paradise Valley Unified School District*, 251 F.3d 1222, 1128 (9th Cir. 2000).[2] If the application of a no restrictions policy to a plaintiff is some evidence the plaintiff is regarded as disabled, beyond a scintilla, then judgment as a matter of law on the failure to meet this element would be inappropriate when such evidence is presented.

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[2] Although one of these cases was decided under Fed. R. Civ. P. 56 and the other under Fed. R. Civ. P. 50, this Court has expressed the view that the legal standards are virtually identical. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986).

MCC misstates the question as whether a no restrictions policy is "conclusive" evidence a plaintiff is regarded as disabled. If such evidence were conclusive, then un-rebutted evidence of such a policy would entitle the *plaintiff* to judgment as matter of law. This is one permissible reading of *McGregor v. Nat'l R.R. Passenger Corp.*, 187 F.3d 1113 (9th Cir. 1999). This reading of *McGregor* would clearly conflict with the Tenth Circuit. However, the approach advocated by Dillon here, and adopted in *Henderson* and apparently *Johnson*, is that a no restrictions policy is evidence from which a jury may infer a plaintiff is regarded as disabled. The evidence is not "conclusive," but it is sufficient.

The *Johnson* court clearly held that the application of the 100% healed policy was sufficient evidence from which the jury could conclude the plaintiff was regarded as disabled. 251 F.3d at 1228. As MCC points out, the plaintiff in *Johnson* was also rejected from thirteen jobs. However, in this case MCC refused to consider Dillon for any job when he asked to come back to work. Dillon presented evidence that there were numerous jobs at the mine. Dillon also presented evidence of pretext, as did the plaintiff in *Johnson*.

Likewise, the *Henderson* court determined that a no restrictions policy raised a question of fact as to whether a plaintiff was regarded as disabled. 247 F.3d at 647-652. The court did state that other questions also came into play, such as how many jobs were at the facility, whether any of the jobs were within the plaintiff's restrictions, and whether there was any evidence the facility had unique requirements within the industry. *Id.* This does not serve to distinguish the case from Dillon's,

because Dillon showed: there were many jobs at West Elk Mine; that he could perform some, if not all, of the jobs at the mine; and there was no evidence West Elk differed from the other mines in the area, or anywhere else. MCC correctly points out that a manager in the *Henderson* case stated that there was no job in the plant that the plaintiff's restriction would not bump into. However, there is no principled difference between this statement and the MCC manager's statement that Dillon was not even close to meeting the physical requirements of West Elk Mine. As the MCC manager's statement was clearly incorrect, it is as much a reflection of the belief Dillon was disabled as the *Henderson* manager's statement.

MCC's own language from its opposition brief demonstrates the split in authority. On page 35 MCC indicates that based upon the Tenth Circuit holding, the no restrictions policy is legally irrelevant to Dillon's claim because Dillon failed to prove he came within the ADA.. That is exactly the split in authority. In the Sixth and Ninth Circuits the no restrictions policy is itself evidence that the plaintiff falls within the protections of the ADA, but not in the Tenth Circuit.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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